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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Arkansas Educational Television Commission ("AETC") holds licenses from the Federal Communications Commission ("FCC") for the five noncommercial, educational ("public") television stations that comprise the Arkansas Educational Television Network ("AETN").

1. Whether a debate between political candidates, organized and broadcast by a state public television network, is a limited public forum (as the Eighth Circuit held below) or a non-public forum, as the Eleventh Circuit has held in direct reliance on this Court's public forum cases?

2. Whether the First Amendment protects the editorial judgments of a state public television network that, free from political interference, applies rational, viewpoint-neutral policies in making journalistic decisions to shape the debate (including the selection of participating candidates), as the Eleventh Circuit has held in direct conflict with the Eighth Circuit's judgment below?

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The Arkansas Educational Television Commission respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App. 1a) is reported at 93 F.3d 497 (8th Cir. 1996). The United States District Court for the Western District of Arkansas did not render an opinion after the jury verdict in this case.

JURISDICTION

The Eighth Circuit entered its judgment on August 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the district court was invoked under the First Amendment to the United States Constitution and 28 U.S.C. §1331 (general federal question jurisdiction).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Sections of the Arkansas Code Annotated, ARK. CODE ANN. §§ 6-3-101-113, 25-16-804; the First Amendment to the United States Constitution; the Communications Act of 1934, as amended, Sections 3(h), 309(a), 312(a)(7), 315(a), and 402(a) (codified at 47 U.S.C. §§ 153(h), 309(a), 312(a)(7), 315(a), and 402(a) (1996)); and the rules of the Federal Communications Commission, 47 C.F.R. §§ 73.1941, 73.1944, are found in the Appendix.

STATEMENT OF THE CASE

In the summer of 1992, the Arkansas Educational Television Network ("AETN" or the "Network"), with help from the Associated Press, began planning to broadcast political debates to cover each of that fall's five races for U.S. House and the race for the U.S. Senate in Arkansas. AETN's purpose in trying to arrange these debates was to serve AETN's viewers (Trial Transcript ["Tr. Trans."] 198-201, 207-208). AETN made the editorial decision to invite to each debate only the Republican and Democratic candidates.

A. The Arkansas Educational Television Commission

Petitioner Arkansas Educational Television Commission ("AETC") is an agency of the State of Arkansas, created to make the benefits of educational television available to the people of Arkansas. AETC operates the Network, five interconnected noncommercial educational television stations licensed to AETC by the Federal Communications Commission ("FCC").

AETC's eight members are appointed by the Governor of Arkansas with advice and consent of the state Senate. Except for educators in the state's public schools or institutions of higher learning, the members may not hold any other state or federal office, nor hold employment paid in whole or part by funds derived from tax sources. The members serve eight year terms and may be removed only for good cause. AETC's and AETN's Executive Director is Susan Howarth.

B. Procedural History

By letter dated August 24, 1992 to Susan Howarth, Respondent Ralph P. Forbes notified AETN that he was an independent candidate for U.S. Representative from the Third District of Arkansas, and requested to be included on equal terms in the debate between his opponents (App 105a). On September 4, 1992, Ms. Howarth responded by letter ("Howarth Letter," App 103a), stating that, under Section 315(a) of the Communications Act, 47 U.S.C. §315(a), as interpreted by the FCC and the courts, debates were exempt from equal opportunities, and that in AETN's bona fide journalistic judgment its viewers would best be served by inviting only nominees of the two major parties (Tr. Trans. 207).

On October 19, 1992, three days before the debate, Forbes sued AETC, its members, its Executive Director, certain AETN staff (collectively, the "AETN Defendants") and others in the United States District Court for the Western District of Arkansas. He alleged that, because he was qualified for the ballot as an independent candidate, he had a right to be included in the debate. Forbes alleged that AETN's decision not to invite him violated the Civil Rights Act, 42 U.S.C. §1981 *et seq.*, and his First Amendment rights. He sought declaratory and injunctive relief and compensatory and punitive damages.

Forbes' motion for a preliminary injunction to force his inclusion in the debate was denied by the District Court on October 20, 1992. On October 21, 1992 and October 22, 1992, respectively, the Chief Judge and a panel of the Eighth Circuit denied Forbes' request for an injunction pending appeal (App. 45a, 43a). The court based its decision in part on *DeYoung v. Patten*, 898 F.2d 628, 632-33 (8th Cir.

1990), which held that a state-owned public television network (the Iowa Public Television Network) is not a public forum for First Amendment purposes, and that candidates do not have a First Amendment right to appear in political debates on a state-owned public television station (App. 46a, 44a). The debate was broadcast without Forbes' participation on October 22, 1992.

One week after the election, the AETN Defendants filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). The District Court granted the motion and dismissed the complaint on December 16, 1992.

An Eighth Circuit panel denied Forbes' request for rehearing on the issue of preliminary relief on December 22, 1992. On April 28, 1994, the Eighth Circuit, *en banc*, affirmed in part and reversed in part the District Court's decision granting the AETN Defendants' motion to dismiss. *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 500 (1994) (petition of AETN), 115 S. Ct. 1962 (1995) (petition of Mr. Forbes) ("*Forbes I*") (App. 25a). The Court reversed on Forbes' First Amendment claim, holding that, "Forbes did allege a First Amendment violation well enough to survive a motion to dismiss." *Id.* at 1428 (App.32a). Further, the Court overruled the earlier Eighth Circuit panel decision in *DeYoung v. Patten*, holding that the panel in that case wrongly decided the First Amendment question of whether a candidate had a First Amendment right of access to appear on a state-owned public television facility. However, the Court left open whether AETN's debate was a limited public forum or a non-public forum. *Forbes I*, 22 F.3d at 1429 (App. 35a).

On September 16, 1994, the AETN Defendants filed with this Court a petition for a writ of certiorari, which was denied on November 7, 1994. On September 19, 1994, Forbes filed a petition for a writ of certiorari, which was denied on May 15, 1995.

Trial began on Forbes' First Amendment claim on June 5, 1995. Forbes admitted that his campaign did not generate any public support or media coverage, and that he raised little money, had no campaign staff, and no campaign headquarters (Tr. Trans. 147-53). He admitted that he drew no crowds and no interest from the press or the public (Tr. Trans. 153-55, 172-3)

Uncontradicted evidence showed that AETN at all times intended to maintain control over all its programming, in order to satisfy the FCC's policies and the requirements of the Communications Act. AETC adopted the *Statement of Principles of Editorial Integrity in Public Broadcasting* ("Editorial Integrity Principles") (App. 64a, 82a) and the "Programming Policy Statement for AETN" ("AETN Programming Policy") (App. 96a) to govern AETN's editorial decision-making (Tr. Trans. 186-192, 193-197). It is also uncontroverted that AETN intended the debate to be exempt from equal opportunities as "on-the-spot coverage of a bona fide news event" under Section 315(a)(4) of the Communications Act, 47 U.S.C. §315(a)(4) (Howarth Letter, App. 103a). The evidence shows that AETN therefore included participants in the debate on the basis of their potential interest and importance to viewers (Tr. Trans. 198-99, 201, 206-07), rather than to advance any candidacy. That is, AETN designed the debate to serve its viewers (Tr. Trans. 198-201, 207-208).

Uncontradicted evidence also showed that AETN analyzed Forbes' lack of public support and absence of press coverage, and the very low likelihood that Forbes would win the election, in determining that Forbes was not a serious candidate (Tr. Trans. 199-202, 207-208, 212-214, 296, 300-301). AETN's editors concluded that viewers in the Third District would not be interested in Forbes' participation, that his presence would detract from the time available for the candidates whose campaigns had generated a significant public response, and therefore that Forbes should not be invited to the debate. *Id.* In addition, the evidence showed that AETN would have given Forbes "reasonable access" to appear on AETN under Section 312(a)(7) of the Communications Act, 47 U.S.C. §312(A)(7), if he had requested it, but that Forbes never did so (Tr. Trans. 157-167, 203-205, 351-352, 355-56).

The District Court instructed the jury that the congressional debate was a non-public forum as a matter of law. On June 7, 1995, the jury returned a special verdict in favor of the AETN Defendants, finding that (1) AETN's decision not to invite Forbes to the debate was not influenced in any way by political pressure, and (2) the decision was not made because of AETN's objections or opposition to Forbes' views (App. 22a, 23a). The District Court entered judgment in favor of the AETN Defendants on June 7, 1995 (App. 21a).

Forbes appealed, claiming, among other things, that the debate was a limited public forum, rather than a non-public forum. On August 21, 1996, a panel of the Eighth Circuit reversed the District Court's decision. *Forbes v. Arkansas Educ. Television Comm'n.*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes II*") (App. 1a). The Eighth Circuit held that the debate was a limited public forum because, "AETN, by

staging the debate, opened its facilities to a particular group — candidates running for the Third District Congressional seat." *Id.* at 504 (App. 14a-15a). The Eighth Circuit also held that, because the debate was a limited public forum, AETN's reason for excluding Forbes — that Forbes was not a "viable" candidate, in the term used by the Court — was not legally sufficient. *Id.* at 505 (App. 17a). The Eighth Circuit held:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. . . . But . . . the people making this judgment were not ordinary journalists: they were employees of government. . . . A journalist employed by the government is still a government employee.

Id. (App. 16a-17a)

The Eighth Circuit concluded that AETN's debate was a limited public forum because it "was staged in order for the candidates to express their views on campaign issues," 93 F.3d at 504 (App. 15a), which the Eighth Circuit distinguished on that basis from the forums in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985), and *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). *Forbes II*, 93 F. 3d at 504 (App. 15a).

After holding that the debate was a limited public forum rather than a non-public forum, the Eighth Circuit said: "The debate was surely a place opened by the government for a limited class of speakers. What was that class?" *Id.* at 504 (App. 15a). The Eighth Circuit answered that question this way:

> Surely government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation.

Id.

On August 30, 1996, the AETN defendants filed with the Eighth Circuit a Motion for Stay of Mandate Pending Petition for Certiorari. On September 25, 1996, the AETN defendants filed with Justice Thomas an Application to Stay Enforcement of Judgment Pending Filing of Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. That application was denied. On September 26, 1996, the Eighth Circuit denied the motion to stay its mandate, but issued a short order stating that *Forbes II* did not prevent AETN from covering debates organized by entities other than AETN, and that *Forbes II* did not apply to write-in candidates (App. 19a).

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision That A Debate On A State-Owned Public Television Station Is A Limited Public Forum Misapplies This Court's Forum Analysis, In Conflict With Decisions Of The Eleventh Circuit And This Court.

Forbes II conflicts with *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991), where the Eleventh Circuit held that the decision not to invite the Libertarian candidates for governor and lieutenant governor of Georgia to a debate initiated and broadcast by the Georgia Public Telecommunications Commission ("GPTC") did not violate the First Amendment. 917 F.2d at 488 & n.2. The Eleventh Circuit applied the forum analysis from *Cornelius* in holding that the debate in *Chandler* was a non-public forum. *Id.* at 488-89.

This is a fresh conflict. It was created by the Eighth Circuit's *en banc* decision in *Forbes I* to overrule the holding in *DeYoung*, 898 F.2d at 633, that a state-entity public broadcaster is not a public forum.

This conflict is important because approximately two-thirds of the public television stations in the United States are licensed to state entities.[1/] If every program to which a

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1/ In *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984), this Court recognized that "[t]he vast majority of financial support [for public broadcasting] comes . . . from state and local governments," 468 U.S. at 390 n.19, and that "at least two-thirds" of public television stations are licensed

(continued...)

viewer seeks access on these stations is held to be a limited public forum under *Forbes II*, any editorial decision can be challenged in federal district court. The station then must show that its journalistic or artistic decision is narrowly tailored to meet a compelling governmental interest. No broadcaster can operate if it can be forced continually to prove that its editorial decisions meet this standard, because:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors — newspaper or broadcast — can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.

Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 124-25 (1973) ("*CBS v. DNC*").

State-entity public broadcasters will especially be beset by demands from candidates who, like Mr. Forbes, are able to gain a place on the ballot simply by gathering a small number of signatures. (Mr. Forbes needed no more than 2,000 signatures. *Forbes II*, 93 F.3d at 500.) Under the rule of *Forbes II*, these broadcasters will have no way to resist the demands of myriad fringe candidates. The *Chandler* court recognized this danger:

> Were we to hold that such an invitation is required by the Constitution, we could see no principled basis upon which that rule could be

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1/ (...continued)
to states or state-related entities, *Id.* at 394 n.22.

> limited to the candidate who has obtained a ballot position and not extended to all other serious candidates.

Chandler, 917 F.2d at 489. Consequently, state-entity licensees will be forced to discontinue sponsorship of political debates, despite the fact the these debates are a significant public service of noncommercial stations.[2/] This is not a hypothetical fear. Because of the *Forbes II* ruling, the Nebraska Educational Telecommunications Network canceled a debate, scheduled for August 25, 1996 between the Democratic and Republican senatorial candidates, because of demands by less newsworthy candidates to be included.[3/] The effect of *Forbes II* is thus to curtail political speech by denying state-entity public broadcasters protection

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2/ The FCC considers political debates to be of great public service value, as its decisions illustrate. *See Chisholm v. FCC*, 538 F.2d 349, 359 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976) (upholding FCC ruling that broadcast of candidates' debates was exempt from "equal opportunities" as "on-the-spot coverage" if the decision to cover it was based on *the broadcaster's good faith, reasonable news judgement*, and not because the broadcaster sought to advance a particular candidacy); *Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd, mem., League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984) (scope of the "on-the-spot" coverage exemption expanded to include debates organized by broadcasters and held in broadcast studios).

3/ Don Walton, *Senate Debate At Fair Canceled, Lincoln Journal Star*, Aug. 24, 1996 at 1A; *Name On Ballot Not Enough To Qualify For Political Debate* (editorial), *Lincoln Journal Star*, Aug. 27, 1996, at 4B.

from legal challenges to their editorial decisions. The First Amendment does not demand this rigid interpretation.

In *Chandler*, the Eleventh Circuit followed the analytical path mapped out in *Cornelius*, holding that content-based decisions by GPTC do not violate the First Amendment:

> GPTC makes content-based decisions on a regular basis . . . to serve Georgians. A decision to air any show is necessarily content-based. GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia. *Such a decision promoted GPTC's function*, was "reasonable" and was "not an effort to suppress expression merely because public officials oppose the speaker's views."

Chandler, 917 F.2d at 489 (*emphasis added*), *citing Cornelius*, 473 U.S. at 788, 800.

Cornelius prescribes the method for analyzing whether a forum is "limited" or "non-public." Although the Eighth Circuit followed *Cornelius* in holding that the relevant forum in this case is the debate rather than the entirety of AETN's programming (App. 12a-13a), *see Cornelius*, 473 U.S. at 800-01 ("[I]n defining the forum we have focused on the access sought by the speaker."), the Eighth Circuit departed sharply from *Cornelius's* injunction that:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the

> Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with [the] expressive activity to discern the government's intent. . . .
>
> We will not find that a public forum has been created in the face of clear evidence of a contrary intent. . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with the expressive activity.

Id., 473 U.S. at 802-03 (*citations omitted*).

The Eighth Circuit did not follow *Cornelius*. For example, the Eighth Circuit did not address uncontroverted evidence that AETN's editorial staff did in fact follow the Editorial Integrity Principles and the AETN Programming Policy in designing the debate format and choosing the debate participants according to journalistic criteria, as specified in those policies. The Eighth Circuit also did not address uncontroverted evidence that AETN's intent *never* included defining the class of debate invitees to be all legally qualified candidates for the Third District House seat, but instead only those candidates who had shown public support in their campaigns, who had a realistic chance of winning the election, and in whose views the television audience therefore would be interested (Tr. Trans. 199-202, 207-208, 212-214). The Eighth Circuit did not address uncontroverted evidence of the fact that AETN wanted the debate to be exempt from equal opportunities under Section 315 (*see*

Howarth Letter, App. 103a, Tr. Trans. 231), or that the debate would not qualify for that exemption if AETN sponsored the debate for the purpose of advancing any candidacy.

In sum, there is not a whit of evidence that AETN ever intended the debate to be open to all candidates for the Third District House seat. *Rather, all the evidence shows AETN intended to open the debate only to those candidates whose campaigns were generating public support and who therefore were of interest to the viewers of the Third District* (Tr. Trans. 198-99). As the debate's producer, Amy Oliver, testified, AETN's overriding criterion was "viewer need and interest" (*Id.* at 307). AETN met this test by inviting only those candidates whose campaigns demonstrated public support, as judged by a several journalistic factors (*Id.* at 210-14, 328).

For example, Ms. Oliver assessed a number of "indicators" (*Id.* at 304) of newsworthiness (*Id.* at 306-07), including the candidates' performances in past elections (*Id.* at 304). Ms. Oliver considered the kind of press coverage Mr. Forbes was receiving, whether he was appearing at rallies, whether he was receiving invitations to speak, whether he was successful in raising money (he had raised less than $10,000 for the race), whether he was appearing in public places such as courthouse squares, whether Mr. Forbes was really a "challenger," his record in previous elections, and the opinions of other journalists in Arkansas who were covering the election in the Third District (*Id.* at 295, 298-99, 302, 328, 341, 344). Ms. Oliver essentially assessed the newsworthiness of Mr. Forbes's candidacy (*Id.* at 202-03, 210-14, 257, 297-99, 306-07). She concluded that the people of Arkansas "did not want to hear" from Mr. Forbes (*Id.* at 331). Based on Ms. Oliver's

recommendations, Ms. Howarth, as AETN's editor-in-chief, made the decision not to invite Mr. Forbes (*Id.* at 184-85).

Ms. Oliver concluded that Mr. Forbes's participation would reduce the time available for debate between the two candidates in whose campaigns, and views, the public was interested (*Id.* at 201, 293, 345). Further, inviting Mr. Forbes to a appear with the candidates who were successful in attracting support would have given Forbes a status, and implied a degree of legitimacy for his candidacy, that he had not earned on the campaign trail (*Id.* at 201-02, 208). In Ms. Howarth's view, not inviting Mr. Forbes was a matter of fairness and balance, of adherence to the highest journalistic standards (*Id.* at 197).

AETN invited the Democratic and Republican party candidates to the debate because nomination by one of these parties "indicat[ed] a certain amount of popular support" (*Id.* at 269; *see also* 288-89). This contrasted with the fact that popular support for Mr. Forbes never materialized (*Id.* at 327-28).

The Eighth Circuit focused on the fact that AETN considered whether Mr. Forbes was likely to win the election or, in the words of the opinion below (but not of AETN's editors), whether Mr. Forbes was a "viable" candidate. AETN did indeed consider Mr. Forbes's chances of winning (*see, e.g.*, Tr. Trans. 341). However, the fact that Mr. Forbes was unlikely to win the election was only one of many factors that AETN analyzed (*see, e.g., Id.* at 328, 344-45).

Under *Bose Corp. v. Consumer's Union*, 466 U.S. 485 (1984), the Eighth Circuit was obliged to "'make an independent examination of the *whole* record,'" *Id.* at 499

(*citation omitted, emphasis added*), because this is a case where a correct interpretation of the facts is intertwined with a correct application of *Cornelius*. In particular, this case turns on AETN's intent regarding the forum. However, the Eighth Circuit did not analyze most of the evidence concerning AETN's intent. Instead, the Eighth Circuit concentrated exclusively on the fact that AETN considered Mr. Forbes unlikely to win the election (App. 16a-17a), and failed to address the totality of factors AETN examined in deciding not to invite Mr. Forbes.

In the process, the Eighth Circuit overlooked the fact that AETN's intent was *never* to open the debate to all legally qualified candidates for the office in question, but only to those candidates whose campaigns were drawing support from the public. This omission of a "constitutional fact" necessary to the First Amendment analysis, *see Bose*, 466 U.S. at 508 n.27 (*citations omitted*), set the Eighth Circuit on an analytical path that is irreconcilable with *Cornelius*.

The Eighth Circuit's error is found in the steps it took to reach the conclusion that the debate was a limited public forum. The Eighth Circuit never analyzed whether AETN's intent to make the debate exempt (as "on-the-spot coverage of a bona fide news event") from equal opportunities under Section 315(a)(4) of the Communications Act, 47 U.S.C. § 315(a)(4) (*see* Howarth Letter, App. 103a, Tr. Trans. 230-31, 355), was relevant to determining the type of forum. Instead, the Eighth Circuit began with an inaccurate premise of "constitutional fact": "AETN, by staging the debate, opened its facilities to a particular group — candidates running for the Third District Congressional seat." *Forbes II*, 93 F.3d at 504 (App. 14a-15a). This premise is flatly contradicted by the consistent record evidence that AETN's

intent was *never* to open the debate to all these candidates, but just to those whose newsworthiness was demonstrated by significant popular support during the campaign.

Next, the Eighth Circuit sought to distinguish the debate from the Combined Federal Campaign ("CFC") in *Cornelius* and the school internal mail system in *Perry*. It said that the CFC was not created "'for purposes of providing a forum for expressive activity.'" *Forbes II*, 93 F.3d at 504 (quoting *Cornelius*, 473 U.S. at 805). The flaw in reliance on this single sentence is that it discards the surrounding analysis in *Cornelius* examining the nature of the government property and the use to which it is dedicated. In *Cornelius*, history did not support "a finding that the Government was motivated by an affirmative desire to provide an open forum for charitable solicitation . . . ." *Id.* Similarly, in *Forbes II*, the record does not support a finding that AETN was motivated by a desire to create an open forum for all Third District congressional candidates. Rather, the opposite is true: AETN sought to provide a forum closed to candidates who were not newsworthy, whose campaigns had not already generated public support and attendant press coverage.

Cornelius also directs courts to examine "the nature of the Government property involved" to see if there was a practice in limiting access, based on the purpose of the government activity for which the property is used. Here again the Eighth Circuit's independent review passed over "constitutional facts" in the record regarding the nature of AETN as a broadcast operation licensed by the FCC.

The *sine qua non* of a broadcast licensee is the legal capacity to exercise unfettered editorial judgment over

programming.[4/] When licensees have failed to retain control over programming, the FCC has denied license renewal.[5/] The requirement for control over programming applies fully to noncommercial licensees.[6/] Without this capacity, the programming decisions of state public broadcasters nationwide would be vulnerable to constant legal attack in federal court.[7/]

The Editorial Integrity Policy (App. 64a, 82a) and the Programming Policy Statement for AETN (App. 96a) were adopted so that AETN would operate in all respects as an institution of the broadcast press, maintaining control over

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4/ *National Broad. Co., Inc. v. United States*, 319 U.S. 190, 218 (1943); *Cosmopolitan Broad. Co., Inc. v. FCC*, 581 F.2d 917, 921 (D.C.Cir. 1978); *United States Broad. Corp.*, 2 F.C.C.2d 208, 225 (1935).

5/ *E.g., Cosmopolitan Broad. Corp.*, 59 F.C.C.2d 558 (1976), *recons. denied*, 61 F.C.C.2d 257 (1975), *rev'd on other grounds, Cosmopolitan Broad. Corp. v. FCC*, 581 F.2d 917 (D.C.Cir. 1978).

6/ *E.g., Alabama Educ. Television Comm'n*, 33 F.C.C.2d 495, 508 (1972), *modified*, 50 F.C.C.2d 461 (1975); *Trustees of the Univ. of Pennsylvania (WXPN)*, 69 F.C.C.2d 1394, 1420 (1978); *Southwest Texas Pub. Broad. Council*, 85 F.C.C.2d 713 (1984).

7/ *See Aldrich v. Knab*, 858 F. Supp. 1480 (W.D. Wash. 1994), *reversed on other grounds (Eleventh Amendment)*, 36 F.3d 1102 (9th Cir. 1994) (Challenge, not involving political candidates, to exercise of programming judgment at noncommercial radio station licensed to University of Washington).

all programming according to the policies of the FCC. *See generally Barnard v. Chamberlain*, 897 F.2d 1059 (10th Cir. 1990) (state bar publication is non-public forum, and plaintiff has no right of access to publish there); *Estiverne v. Louisiana State Bar Association*, 863 F.2d 371 (5th Cir. 1989) (same); *Avins v. Rutgers*, 385 F.2d 151 (3rd Cir. 1967), *cert. denied*, 88 S.Ct. 855 (1967) (refusal of state university law review editors to accept for publication law review article did not violate plaintiff's First Amendment rights); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), *aff'd en banc*, 489 F.2d 225, *cert. denied*, 416 U.S. 995 (1973) (First Amendment violated when state university attempted to censor student literary magazine); W. Canby, "The First Amendment and the State as Editor: Implications for Public Broadcasting," 52 *Texas L. Rev.* 1123 (1974). This is comparable to the "'wide discretion and control'" that government "'must have'" in the federal workplace, *Cornelius*, 473 U.S. at 805, because maintaining editorial control, especially in news programming such as debates, is essential to being a broadcast licensee.

No person has a First Amendment right of access to appear on news programs on broadcast stations licensed to non-state entities. The Communications Act's regulatory scheme is built around licensee control of program content:

> The legislative history of the [Act] reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with — and firmly rejected — the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.

CBS v. DNC, 412 U.S. at 104-105 (citation omitted). Because the function of a broadcast licensee is to exercise editorial control, the Eleventh Circuit in *Chandler* held that GPTC's exercise of editorial control over participants in a congressional candidates' debate was wholly consistent with GPTC's function under *Cornelius*. *Chandler*, 917 F.2d at 489. This analysis of the government function of a broadcaster operating within the framework of the Communications Act is missing from the Eighth Circuit's reliance, in isolation, on the single sentence from *Cornelius* that the CFC was not created for purposes of expressive activity.

Similarly, the Eighth Circuit is unsuccessful in distinguishing *Perry* when it asserts that access to the internal school mail system in *Perry* "was designed solely for expression relating to school business" and "was granted to groups on an individual basis and was not "'granted as a matter of course to any particular group.'" *Forbes II*, 93 F.3d at 504 (App. 15a). The mail system in *Perry* is analogous to the candidate debates on AETN, because the debates were designed solely to serve AETN's viewers, and were therefore open only to newsworthy candidates (as judged by AETN's editors). The Eighth Circuit's conclusion from *Perry* that the debate "was staged [by AETN] in order for the candidates to express their views on campaign issues," *Forbes II*, 93 F.3d at 505 (App. 15a), thus fails to account for the nature of the forum in *Perry* and the "constitutional facts" from the record about AETN's intent in organizing the debate.

Nowhere is the departure from *Cornelius* clearer than in this part of the Eighth Circuit's opinion:

> The debate was surely a place opened by the government for a limited class of speakers. What was that class?. . . .Surely government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation.

Forbes II, 93 F.3d at 504 (App. 15a). However, there is no naturally occurring class of speakers who are protected by the First Amendment under *Cornelius*, any more than there was a naturally occurring class of potential CFC participants to be protected in *Cornelius* itself.[8/] The candidates whose campaigns are drawing public support, who have been successful in raising funds, drawing crowds, and garnering unabated press coverage, are as "natural" a "class" for purposes of the debate — a bona fide news event — as is the group of all legally qualified candidates for the particular office. So the Eighth Circuit's conclusion as to the nature of the forum is a sharp turn away from this Court's controlling precedent, as well as from *Chandler*.

The Eighth Circuit's departure from the forum analysis required under *Cornelius* improperly diminishes the editorial rights of all state-entity broadcast licensees in the Eighth Circuit. In practice, it will burden state-entity licensees' decisions about whether to hold candidates' debates, and

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8/ The Eighth Circuit in fact revised its judgment in *Forbes II* to exclude from the class both write-in candidates and candidates in debates covered, but not organized, by AETN (App. 19a). This demonstrates the elusiveness of the concept of a natural class of debate participants, particularly when so many televised political debates involve only the most newsworthy candidates.

about whether to try to exclude candidates who are not newsworthy. For these reasons, the decision below should be reviewed by this Court.

II. Contrary To The Eighth Circuit's Decision, Even If A Debate On A State-Owned Public Television Station Is A Limited Public Forum, AETN's Editorial Judgment Did Not Violate Forbes' First Amendment Rights.

Both the Fifth and Eleventh Circuits have turned aside First Amendment challenges to the legal capacity of state-entity public broadcasters to make editorial decisions. *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) (public television viewers cannot force state public broadcast licensees in Alabama and Texas to air a particular program); *Schneider v. Indian River Community College Found.*, 875 F.2d 1537 (11th Cir. 1989) (attacks by former station staff members against editorial policies of the licensee, a community college board, held not to state a First Amendment claim); *see also Community-Serv. Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978).

The Fifth Circuit, in *Muir*, and the Eleventh Circuit, in *Schneider*, considered at length the First Amendment and equal protection dilemma posed by state public broadcasting licensees. *See Chandler*, 917 F.2d at 488 & n.3. Both were relied upon in *Chandler* for guidance as to the "the extent of discretion a public broadcast licensee can exercise consistent with the First Amendment." *Id.* at n.3. All three cases rely on Judge Rubin's view:

> Licensing is not destiny. That the state is the licensee does not predetermine the station's function. The state may elect the station's mission, so long as this mission is consistent with the station's license and the Constitution. The prerogatives of managers, editors, and programmers, the rights of access of those who seek exposure, and the rights of viewers, as well as the prerogatives of the licensee itself as a state agency, are at least in large part determined by this mission.

Muir, 688 F.2d at 1049. In *Chandler*, the Eleventh Circuit analyzed GPTC in Judge Rubin's framework:

> GPTC is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." . . . Further, as a public television station, GPTC is under an obligation to serve the public interest. [ ] GPTC's employees make editorial decisions on a daily basis determining which programs to air in order to meet the needs and interests of Georgia's citizens. Obviously a decision to broadcast one program excludes, for that time, all other programs.

917 F.2d at 488 (references and footnote omitted).

AETC fits this mold. AETC's mission is to "[make] the benefits of educational television available to and [promote] its use by inhabitants of Arkansas," and for that purpose AETC is "charged with the duty of controlling and

supervising the use of channels reserved by the [FCC] to Arkansas for noncommercial educational use."[9/]

In its forum analysis of the debate, the Eighth Circuit did not address AETC's adoption of the Editorial Integrity Principles and the AETN Programming Policy, the two policies that govern AETN's editorial decision-making and require AETN to maintain control over all its programming (App. 82a, 96a). For example, the Eighth Circuit did not discuss the relevance of these policies, under *Cornelius*, 473 U.S. at 806, to the determination of the type of forum that AETN intended to create when it scheduled the debate, or to the legitimacy under *Cornelius* of AETN's editorial decisions about the debate.

These policies are important evidence of AETC's intent to establish AETN as an institution of the press, operating according to the same journalistic standards as privately owned entities of the broadcast press (App. 82a, 96a). The Editorial Integrity Principles and the AETN Programming Policy also evidence AETN's intent that every one of its programs will be a non-public forum, and show in any event that the policies require AETN to maintain editorial control at all times (App. 82a, 96a).[10/]

9/ ARK. CODE ANN. §§ 6-3-105(a),(c) (Michie 1993) (App. 50a).

10/ AETC's adoption of these rational, viewpoint-neutral policies also satisfies the rule in *Cornelius*, 473 U.S. at 812, that, "there is no requirement that regulations limiting access to a nonpublic forum must be precisely tailored . . . ." The policies are consistent with *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 392-3 (continued...)

The central import of these policies is reinforced by the list of factors Ms. Oliver considered before recommending to Ms. Howarth that Mr. Forbes was not newsworthy and that he should not be invited to the debate. The integrity of AETN's journalistic process is bolstered by the jury's specific findings, in response to the special verdict interrogatories, that no political pressure was exerted on AETN and that Mr. Forbes' views were not a factor in Ms. Oliver's recommendation or Ms. Howarth's decision.

Yet, if the Eighth Circuit's approach is controlling, AETC may no longer have the legal capacity either to comply with its organic statute or to fulfill the most basic licensing requirement of the FCC, namely, to control its programming via the exercise of programming discretion.[11/]

10/ (...continued)
(1993) (analyzing *Cornelius's* approval of governmental control over access to a non-public forum if the restrictions are reasonable in light of the forum's purpose and viewpoint-neutral), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516-17 (1995) (discussing "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created"). The application of these viewpoint-neutral programming policies in the editorial process used to evaluate Mr. Forbes' request to participate in the debate (combined with the jury's special verdict that no political pressure affected the application of these policies) demonstrates that, in policy and practice, AETN operates consistently with *Cornelius*.

11/ The FCC has licensed hundreds of public radio and television stations to state entities on the assumption that (continued...)

If, for every programming determination that is challenged by a disgruntled viewer, listener, or candidate, state licensees must appear in federal court to prove that their editorial decisions serve a compelling governmental need and are narrowly tailored, the practical effect will be to mire programming and journalistic processes beyond use.

This was precisely the problem perceived by the Fifth Circuit in holding that state public television licensees in Alabama and Texas were not under a First Amendment obligation to carry the program, "Death of a Princess." In the opinion which is the law of the Fifth and Eleventh Circuits, *Schneider*, 875 F.2d at 1541 and n.2, Judge Rubin reasoned:

> Judicial reassessment of the propriety of a programming decision made in operating a television station involves not only interference with station management but also reevaluation of all of the content-quality-audience reaction factors that enter into a decision to use or not to use a program by a medium that cannot possibly, by its very nature, accommodate everything that every viewer might desire.

Muir, 688 F.2d at 1052 (Rubin, J., concurring).

Similarly, in *Schneider*, where the Eleventh Circuit considered attacks by former station staff members against

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11/ (...continued)
state-entity licensees have the legal capacity to exercise independent editorial judgment. *Forbes I* and *Forbes II* undermine this assumption.

the editorial policies of the licensee, a community college board, the court declared:

> It is clear that Congress concluded that the First Amendment rights of public television viewers and radio listeners are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest.

875 F.2d at 1541.

The D.C. Circuit perceived a threat to public broadcasters' journalistic discretion from the program recording requirement in former Section 399(b) of the Communications Act, which it struck down on First Amendment and equal protection grounds. *Community-Serv. Broadcasting*, 593 F.2d at 1122-23.12/ In analyzing the necessity for all of public broadcasting to be free of interference from the federal government, despite the dangers inherent in the federal funding scheme, the D.C. Circuit said:

> [R]ecognition of the risks of program-by-program review is one that has been shared by both the courts and the [FCC]. The FCC has generally eschewed any such review . . . and where it must take place, . . . review has been accompanied by judicially imposed standards and safeguards designed to minimize intrusion on First Amendment values.

12/ *See also League of Women Voters*, 468 U.S. at 370 n.7.

Id. at 1115 (citations omitted). The Eighth Circuit, in overruling its earlier decision in *DeYoung*, is establishing a regime that seeks to regulate, through judicial supervision under forum doctrine, a major portion of public broadcasting's editorial decision-making. This fails to minimize the danger to state licensees' First Amendment rights and, in the process, invites these enormous risks.[13/]

A contrary rule flows directly from *Forbes II*. Its potential effect is most palpable for state-related public broadcast licensees within the Eighth Circuit, but may well affect licensees in circuits other than the D.C., Fifth, and Eleventh. In the meantime, the chill on state-related public broadcasters' editorial freedoms under the Communications Act and the First Amendment is all too real.

13/ The danger is illustrated by *Marcus v. Iowa Public Television,* No. 4-96-CV-80690 (S.D. Iowa, Oct. 9, 1996), *injunction pending appeal denied,* No. 96-3645 (8th Cir. Oct. 11, 1996). In that case, various candidates, relying on *Forbes II*, challenged the editorial judgment of Iowa Public Television, an agency of the State of Iowa ("IPTV"), not to invite them to a weekly news program where the Democratic and Republican candidates in each of Iowa's House and Senate races were invited to appear over several successive weeks. IPTV based its decision on newsworthiness. The District Court found that the program was a limited public forum, and that IPTV's editorial decisions were narrowly tailored to serve a compelling governmental interest. Although IPTV's editorial decisions were vindicated by a detailed special jury verdict and the ruling of the District Court, the burden on IPTV was enormous. No broadcaster can long afford to spend such resources to protect its right to make programming decisions, the lifeblood of its service to the public.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 19, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2722WA

Ralph P. Forbes, and The People,	*	
Appellant,	*	
v.	*	
The Arkansas Educational Television Commission, and its Board of Directors in their Official Capacities; The Arkansas Educational Telecommunications Network Foundation, and its Members and Officers Susan J. Howarth, in her Official Capacity as Executive Director; Victor Fleming, in his Official Capacity as Chairman; G. E. Campbell, in his Official Capacity as Vice-Chairman;	*	On Appeal from the United States District Court for the Western District of Arkansas.

Dr. Caroline Whitson, in her *
Official Capacity as Secretary; *
Diane Blair, in her Official *
Capacity as Commissioner; *
S. McAdams, in his Official *
Capacity as Commissioner; *
James Ross, in his Official *
Capacity as Commissioner; *
Jerry McIntosh, in his Official *
Capacity as Commissioner; *
Lillian Springer, in her *
Official Capacity as *
Commissioner; Amy L. Oliver, *
in her Official Capacity as *
Production Manager; Bill *
Clinton, his Official Capacity *
as Governor of the State of *
Arkansas; John Does, Sued as *
certain" John Doe" crooked, *
lying politicians and *
political "dirty tricks" *
operatives and special *
interests, etc.; KHBS *
TV/Channel 40 UHF; KHOG *
TV/Channel 29 UHF; American *
Broadcasting Company, Agent *
Darrel Cunningham; *
Steve Barnes, KARK TV, *
4 Eye-Witness News and AETN *
Producer; Oscar Eugene Goss, *
Arkansas Educational Television *
Network; Carol Adornetto; *
Larry Foley; Lavenia Craig, *
in her Official Capacity as *
Commissioner; Robert *

Doubleday, in his Official *
Capacity as Commissioner, *
*
Appellees. *

Submitted: April 11, 1996

Filed: August 21, 1996

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and JOHN R. GIBSON, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

This case is before us for the second time. On the prior appeal, this Court, sitting *en banc*, held that the plaintiff, Ralph P. Forbes, had stated a claim. *Forbes v. Arkansas Educational Television Network*, 22 F.3d 1423 (8th Cir.) *(en banc)*, *cert. denied*, 115 S. Ct. 500 (1994) (petition of AETN), 115 S. Ct. 1962 (1995) (petition of Mr. Forbes). The case arises out of a debate staged by the defendant Arkansas Educational Television Commission, an agency of the State of Arkansas, between the Democratic and Republican candidates for Congress in the Third District of Arkansas in 1992. Mr. Forbes, who was also a legally qualified candidate in that race, asked to be included in the debate but was refused. He claimed, among other things, that his exclusion violated the First Amendment, as made

applicable to the states through the Due Process Clause of the Fourteenth Amendment. We held that the First Amendment applied fully to the Arkansas Educational Television Network (AETN), and that the defendants were not free to exclude Mr. Forbes without a reason good enough to pass muster under that Amendment. The case had not progressed far enough for defendants to file an answer. Hence, there was no way of knowing, on the state of the record as it then existed, why AETN had excluded Mr. Forbes. The case was remanded for further proceedings.

On remand, the plaintiff's First Amendment claim was tried to a jury. By special verdicts, the jury found that the decision to exclude the plaintiff from the debate was not the result of political pressure, and that it was not based on opposition towards plaintiff's political opinions. In addition, the District Court instructed the jury that the congressional debate, as set up by the defendant network, was a non-public forum. Judgment was entered for defendants.

Mr. Forbes now appeals. He argues that the debate was a limited public forum, and that the reason given for excluding him, that he was not a "viable" candidate, even if it was the true reason, was not legally sufficient. We agree. We hold that a governmentally owned and controlled television station may not exclude a candidate, legally qualified under state law, from a debate organized by it on such a subjective ground. To uphold such a defense would, in our view, place too much faith in government.

I.

We briefly restate enough of the facts and proceedings below to place the present issue in context. In October 1992, the Arkansas Educational Television Commission

decided to conduct and broadcast a debate between the Republican and Democratic candidates for Congress in the Third District of Arkansas. The plaintiff, Ralph P. Forbes, then became a duly qualified independent candidate under state law. He was certified as an independent candidate because he had gathered enough signatures on petitions. Under state law, a candidate must file petitions signed by at least three percent of the qualified electors in the district in which he is seeking office, provided, however, that no more than 2,000 signatures are required. Ark. Code Ann. § 7-7-103(c)(1). Mr. Forbes heard about the debate and asked to be included. AETN refused, and the debate took place on October 22, 1992, without Mr. Forbes's participation. In the meantime, the plaintiff had filed suit in the District Court, seeking a preliminary injunction, but this relief was denied. Thereafter, the District Court granted AETN's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

The plaintiff appealed, and this Court, sitting *en banc*, affirmed in part and reversed in part. We rejected Mr. Forbes's claim under the Federal Communications Act, holding that § 315 of that Act, 47 U.S.C. § 315, does not create a private cause of action. As to the First Amendment claim, however, we held that Forbes's pleading was sufficient to survive a motion under Rule 12(b)(6). The defendants argue that the case should be governed by public-forum analysis. In response to this position, we held that governmentally owned television stations are not traditional public fora, but that they might, under the particular circumstances of any given case, create a limited public forum, "a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, a limited topic,

or a limited class of speakers." *Forbes*, 22 F.3d at 1429 (citations omitted). We added:

> Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the Third Congressional seat. This is a determination the factfinder would have to make after carefully looking at the nature of the debate forum. If it were determined that AETN had created a limited public forum, then Forbes would have a First Amendment right to participate in the debate and could be excluded only if AETN had a sufficient government interest.

Ibid. Observing that "AETN . . . has not yet articulated any principled reason for excluding Forbes," *id.* at 1430, we remanded for further proceedings.

On remand, as we have previously noted, the District Court tried the case to a jury. In accordance with our en banc opinion, the Court correctly refused to submit to the jury any claim under the Communications Act itself. Only the First Amendment claim was submitted. But before the case went to the jury, the District Court held, as a matter of law, that the debate in question was a non-public forum. The District Court said: ". . . the Court has ruled that the type of forum we are talking about in this case is a non-public forum." Thus, the question whether the debate was a non-public forum or a limited public forum was not submitted to the factfinder. It was taken from the jury and decided by the Court. The issue whether defendants'

proffered justification -- that Forbes was not a viable candidate -- would be legally sufficient if the debate were a limited public forum was not reached. Instead, the District Court submitted to the jury only those discrete issues of fact that it deemed relevant under its holding that the debate was a non-public forum.

On special verdicts, the jury found, first, that the decision to exclude Mr. Forbes was not the result of any political pressure coming from outside the professional staff of AETN. (Under the theory presented by defendants at the trial, this would have been the only basis for a recovery by the plaintiff.) The jury found, in addition, that the defendants did not exclude Mr. Forbes from the debate because of disagreement with his opinions. In accordance with these findings of fact and the Court's holding on the public-forum issue, judgment was then entered for defendants.

II.

We first discuss three procedural arguments made by Mr. Forbes as part of his attempt to upset the judgment of the District Court. The first argument has to do with the special interrogatories put to the jury. The first of these interrogatories read as follows:

> Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political pressure from anyone inside or outside of the Arkansas Educational Television Network?

Trial transcript (Tr.) 475. The jury answered no to this question. *Id.* at 502. Mr. Forbes's argument is that this interrogatory was unnecessary to a finding that AETN violated [illegible] First Amendment rights, and that submitting it to the jury was confusing. We do not agree that use of the interrogatory was reversible error.

Whether to submit a case on special interrogatories, and, if so, how to phrase them, are matters committed, within broad limits, to the discretion of the district courts. We have no reason to believe that this jury was confused. We have great faith in juries, and their desire and ability to follow instructions and make distinctions among the various issues put before them. It may be true that submission of this special interrogatory, strictly speaking, was unnecessary. The First Amendment can be violated even if no political pressure is exerted. For example, officials of AETN, entirely apart from political pressure, might have decided to exclude Mr. Forbes because of disagreement with his political opinions. (As we have seen, the jury found that this did not occur, but, at the time the case was submitted to the jury, this was still a live issue.) It is very likely that the exertion of political pressure, if it had occurred, would have been a good theory of First Amendment violation, because such pressure, in all probability, would have proceeded out of someone's disagreement with or prejudice against Mr. Forbes's political positions. The jury's negative answer to the interrogatory did not mean that the case was over; it meant only that one possible theory of liability had been rejected. The jury remained free to consider the other interrogatories submitted to it, and we believe it did so conscientiously.

The jury then went on to answer the second interrogatory, asking whether the decision to exclude Mr.

Forbes was based on disagreement with his political viewpoint. The answer to this question was no. We do not know what our answer would have been if we had been sitting on the jury, but that is not important. There was conflicting evidence on this issue, and it could have gone either way. Making decisions of this kind is exactly what juries are for. It was within the discretion of the District Court to submit the issue to the jury in this form, and the evidence is sufficient to support its negative answer.

Mr. Forbes also argues that it was prejudicial error to exclude evidence which, he contends, would have shown that the husband of the producer of the debate for AETN was prejudiced against him. We cannot agree that any error was committed in this regard. If we assume that the husband did not like Mr. Forbes's opinions, and if we further assume, and this would be something of a stretch on the present record, that his wife knew this, it by no means follows that the wife was in agreement. Spouses' political opinions sometimes agree. They sometimes disagree. We do not think any general inference can be drawn from the opinion of one spouse to that of the other. The District Court did not abuse its discretion in rejecting this evidence.[1/]

1/ Mr. Forbes also argues that the District Court erred in refusing to submit the issue of punitive damages to the jury. We believe the District Court acted correctly in this regard. There was no substantial evidence of malice or other outrageous conduct on the part of these defendants. Therefore, there would have been no basis for an award of punitive damages, and such an award, if returned by the jury, would have to be set aside for lack of sufficient evidence.

III.

It remains to discuss what has emerged as the main issue -- whether the congressional debate staged by AETN was a limited-purpose public forum, or a non-public forum, and, if it was the former, whether AETN's reason for excluding Mr. Forbes can survive scrutiny under the First Amendment. (We agree with the District Court that the jury's finding that the exclusion was not viewpoint-based is fatal to Mr. Forbes's case if the debate was a non-public forum.) That this is the major issue in the case became clear at oral argument. Counsel for defendants, citing *Bose Corp. v. Consumer's Union*, 466 U.S. 485 (1984), argued that the issue of how to characterize the forum was properly decided by the judge. Certain First Amendment issues, he asserted, are for the Court, not the jury, and are then subject to de novo review on appeal.

We are not sure that *Bose* holds that all First Amendment issues of fact are to be decided by the court instead of the jury in cases otherwise triable to a jury under the Seventh Amendment. This is an action at law for damages, a timely demand for jury trial was made, and a jury was properly empaneled. Certain issues of historical fact -- for example, whether Forbes was excluded from the debate because of hostility to his opinions -- are certainly for the jury, assuming that the evidence was in sufficient conflict to allow reasonable jurors to go either way. Thus, the issues covered by the special interrogatories put to the jury in this case were correctly treated as jury issues, and we do not understand defendants to argue otherwise.

By contrast, the question of what exactly the forum was in this case, whether it was a non-public forum or a limited public forum, is a different sort of issue. It is a mixed

question of law and fact, as to which the answer is obtained by applying legal principles to facts. We do not understand the historical facts -- for example, who set up the debate, who was invited to attend, who was excluded, and the like -- to be in dispute. If defendants, by citing *Bose*, are asserting that such issues are never to be submitted to juries, we are not convinced. *Bose* has to do with the reviewing or appellate function in First Amendment cases. It does not, at least not in so many words, address the division of functions between judge and jury at the trial level.

In the present case, this distinction, between the division of functions at the trial level and the standard of review at the appellate level, seems to us of no practical significance. Suppose the district court had allowed the issue of how to characterize the forum to go to the jury, and suppose the jury had decided it one way or the other. The party losing this issue would surely have filed a motion for judgment notwithstanding the verdict, now called a motion for judgment as a matter of law, and the district court would have ruled on the motion. In doing so, the district court would have gone through the same mental process engaged in by appellate courts. It would have been exercising essentially a reviewing function. And this Court, in turn, would have been bound to apply the *Bose* approach on appeal.

The Supreme Court's opinion in *Bose* holds that appellate courts must "conduct an independent review of the evidence on . . . dispositive constitutional issue[s]" in First Amendment cases. 466 U.S. at 508. *Bose* was a bench-tried case, but the opinion clearly indicates that the same appellate standard applies in cases tried to juries:

> . . . The rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.

Id. at 501. In short, "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." *Id.* at 508-09 n.27. Our recent opinion in *Families Achieving Independence and Respect v. Nebraska Department of Social Services*, _____ F.3d _____, _____, 1996 WL 426147 *3 (8th Cir., July 31, 1996), reaches the same conclusion: "[W]here . . . constitutional issues [in First Amendment cases] present mixed questions of law and fact, our review is de novo."

We have a complete record before us on the public-forum question, and we have the holding of the District Court on that issue. We now proceed to exercise our constitutional duty to conduct an independent review.

As an initial matter, we must determine whether the forum at issue is the television station, AETN, or the Third District congressional debate. At oral argument and throughout its brief, AETN contends that the station is the relevant forum. Forbes, on the other hand, contends that our analysis should focus on the debate.

The choice between the two forums suggested is not a difficult one. "In defining the forum we [ ] focus [ ] on the access sought by the speaker." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). If the speaker seeks general access to public property, the forum encompasses that property. But if only limited access is sought, we must take a "more tailored approach to

ascertain[ ] the perimeters of a forum within the confines of the government property." *Ibid.*

Forbes sought access to the debate alone. The debate is a particular program among the numerous programs broadcast by AETN each day. Traditionally, when a speaker "seek[s] access to a particular means of communication," it is that particularized forum which becomes the focus of analysis. *Ibid.* In keeping with that tradition, we conclude that the debate – the means of communication to which Forbes seeks access – is the relevant forum in this case.

Having identified the forum, we now turn to the more difficult question of determining its character. Forbes maintains that by staging the debate, AETN created a limited public forum. This type of forum has been defined as a forum "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802. The Supreme Court has recognized the existence of a limited public forum in a number of instances where the State "does not itself speak or subsidize transmittal of a message it favors but instead . . . encourage[s] a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2519 (1995). Examples of limited public forums include university meeting facilities opened for use by registered student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981), and municipal theaters open to theater productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). See also *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on public bus held to be a limited public forum for commercial advertising); *Healy v. James*, 408 U.S. 169 (1972) (public

college's recognition of student political groups created a limited public forum).

A non-public form, by contrast, is "[p]ublic property which is not by tradition or designation a forum for public communication . . .." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). A non-public forum is not necessarily transformed into a public or limited public forum even though the State engages in a practice of "selective access," by "allow[ing] some organizations . . . to use the facilities." *Id.* at 47. *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446 (1995) (forum is nonpublic when "reserved for specific official uses"). In *Perry*, the Supreme Court held that a public school's internal mail system was a non-public forum even though officials had allowed some community organizations to use the system. *Perry*, 460 U.S. at 47 (finding no evidence that "permission ha[d] been granted as a matter of course to all," the Court concluded that "selective access does not transform government property into a public forum."). Similarly, in *Cornelius*, the Supreme Court held that the Combined Federal Campaign (CFC), an annual charitable-fundraising drive administered by the Office of Personnel Management, was a non-public forum. As it did in *Perry*, the Court reasoned that "selective access [to charities], unsupported by evidence of a purposeful designation for public use, [did] not create a public forum." *Cornelius*, 473 U.S. at 805.

There is no bright line or objective test for determining the character of the forum. We can say without reservation, however, that the forum in this case, the debate, is a limited public forum. Just as the university in *Widmar* created a limited public forum by opening its facilities to registered student groups for expressive speech, AETN, by staging the

debate, opened its facilities to a particular group -- candidates running for the Third District Congressional seat. The debate may be readily distinguished from the forums at issue in *Cornelius* and *Perry*. In *Cornelius*, it was clear that the CFC was not created "for purposes of providing a forum for expressive activity." *Ibid.* The expression made by giving money to charity was merely incidental to the purpose for which the forum was opened -- "to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by lessening the amount of expressive activity occurring on federal property." *Ibid.* Likewise, the forum in *Perry*, the school's internal mail system, was designed solely for expression relating to school business. Access to the system was granted to groups on an individual basis and was not "granted as a matter of course" to any particular group. The debate staged by AETN, on the other hand, was staged in order for the candidates to express their views on campaign issues.

The debate was surely a place opened by the government for a limited class of speakers. What was that class? Was it all candidates for Congress legally qualified to appear on the ballot, or was it simply the Republican and Democratic candidates? The latter answer, which essentially is the position espoused by defendants, is not supportable either as a matter of law or logic. Surely government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation. It must be emphasized that we are dealing here with political speech by legally qualified candidates, a subject matter at the very core of the First Amendment, and that exclusion of one such speaker has the effect of a prior restraint - it keeps his views from the public on the occasion in question.

The real issue, we think, is the legal sufficiency of the reason given for the exclusion. If AETN had considered Mr. Forbes a viable candidate, it would, by its own account, have included him in the debate. There is nothing about being a Democrat or a Republican, *a priori*, that is relevant here. Rather, AETN's point is that Mr. Forbes, in the opinion of the network, had no chance to win. It therefore decided that its viewers should not hear Mr. Forbes's opinions as part of the debate involving the other candidates qualified to appear on the ballot.

We do not think that AETN's opinion on such a debatable matter as the political viability of a candidate for Congress more than two months in advance of the election can be a sufficient basis for narrowing the channels of public discourse. AETN itself characterizes the criteria it used as follows: "While these criteria can to some extent be considered as objective, ultimately their use is essentially subjective." Brief for Appellees 30. In a sense, the State of Arkansas has already, by statute, defined political viability. Mr. Forbes had gathered enough signatures to appear on the ballot. So far as the law was concerned, he had equal status with the Republican nominee and the Democratic nominee. Whether he was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication.

We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. We also believe that the judgment in this case was made in good faith. But a crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of government. The First Amendment exists to protect individuals, not government.

The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment. Compare *Families Achieving Independence and Respect v. Nebraska Department of Social Services, supra*, ___ F.3d at _____, 1966 WL 426147 *3-4 (vague standard cannot justify exclusion even from a non-public forum). If Mr. Forbes can be excluded today, a Republican or a Democrat who is believed to have no chance of success could be excluded tomorrow. It is worth noting that Mr. Forbes himself received the most votes in the preferential primary for the Republican nomination for Lieutenant Governor in 1990. (He was defeated in a run-off primary.) To give just one more example, in 1958, in the Second Congressional District, a write-in candidate who equipped his supporters with stickers that could readily be applied to the ballot defeated the incumbent Democratic Member of Congress, despite the fact that he began his campaign very shortly before the election. Political viability is a tricky concept. We should leave it to the voters at the polls, and to the professional judgment of nongovernmental journalists. A journalist employed by the government is still a government employee.

In short, we hold that the reason given for excluding Mr. Forbes (and we accept at face value defendants' proffered reason) was not legally sufficient under the First Amendment. It was neither compelling nor narrowly tailored. Mr. Forbes is entitled to a judgment in his favor so declaring. The only issue remaining to be decided is that of damages, whether nominal or compensatory.

The judgment of the District Court is reversed, and the cause remanded for further proceedings consistent with this

opinion. The District Court is instructed to enter judgment for the plaintiff Forbes and against the defendant Arkansas Educational Television Commission, and, thereafter, to empanel a jury for the sole purpose of determining the amount of actual damages sustained.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2722WAFS Ralph P. Forbes, etc.	*	
Appellant,	*	
	*	Appeal from the United
vs.	*	States District Court
	*	for the Western District
The Arkansas Educational	*	of Arkansas
Television Commission, etc.,	*	
et al.,	*	
	*	
Appellees.	*	

The motion for stay of mandate is denied. A couple of observations may be helpful. First, defendants are free, to the extent provided by law, to cover bona fide news events, including candidate debates organized by people or groups other than the defendants. Second, no question with respect to write-in candidates was presented or decided in this case.

It is so ordered.

September 26, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RALPH P. FORBES PLAINTIFF

vs. Civil No. 92-2190

AETN ET AL DEFENDANTS

JUDGEMENT

This case came on for trial before the court and a jury, the Honorable H. Franklin Waters presiding, and the issues having been duly tried and the jury having rendered its verdict herein,

IT IS ORDERED AND ADJUDGED, in accordance with the jury verdict returned on June 7, 1995, that the plaintiff take nothing on his complaint filed herein and that this matter should be and it hereby is dismissed with prejudice.

Dated this 7th day of June, 1995.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

APPENDIX D

INTERROGATORY NUMBER ONE: Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political pressure from anyone inside or outside of the arkansas educational television network?

ANSWER: Yes (YES OR NO)

(DATE) (SIGNATURE OF FOREPERSON)

INTERROGATORY NUMBER TWO: Do you find from a preponderance of the evidence that the defendants excluded Mr. Forbes from the political debate because of objections or opposition to his views?

ANSWER: Yes (YES OR NO)

(DATE) (SIGNATURE OF FOREPERSON)

If you answered "yes" to interrogatory number two, please answer this interrogatory.

INTERROGATORY NUMBER THREE: State the amount of damages you find from a preponderance of the evidence were sustained or incurred by the plaintiff as a direct result of the conduct of the defendants.

ANSWER: _____ (AMOUNT)

_____ _____

(DATE) (SIGNATURE OF FOREPERSON)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-1031WA

Ralph P. Forbes, and the People,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
Arkansas Educational Television	*	
Communication Network	*	
Foundation, and its Board of	*	
Directors in their official	*	
capacities; Arkansas Education	*	
Telecommunications, and its	*	
members and officers; Susan J.	*	
Howarth, in her official	*	
capacity as Executive Director;	*	
Victor Fleming, in his official	*	
capacity as Chairman;	*	On Appeal
G.E. Campbell, in his official	*	from the United
capacity as Vice-Chairman;	*	States District
Dr. Caroline Whitson, in her	*	Court for the
official capacity as Secretary;	*	Western District
Diane Blair, in her official	*	of Arkansas.
capacity as Commissioner;	*	
S. McAdams, in his official	*	
capacity as Commissioner;	*	
James Ross, in his official	*	
capacity as Commissioner;	*	

Jerry McIntosh, in his official capacity as Commissioner; Lillian Springer, in her official capacity as Commissioner; Amy L. Oliver, in her official capacity as Production Manager; Bill Clinton, in his official capacity as Governor of the State of Arkansas; and John Does; KHBS-TV/Channel 40 UHF; KHOG-TV/Channel 29 UHF; American Broadcasting Company; Darrel Cunningham, in his individual capacity,

Appellees.

Submitted: August 31, 1993

Filed: April 28, 1994

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

The petitioner, Ralph Forbes, appeals the District Court's dismissal of his complaint for failure to state a claim

upon which relief can be granted. Forbes raises two issues. First, does a private television station violate the Federal Communications Act by deciding to air a political advertisement during "safe harbor" hours without first determining whether that ad is "indecent"? Second, does a political candidate who has qualified to be on the ballot have a right to be included in a debate sponsored by a public television station or, in the alternative, a right to equal access under 47 U.S.C. § 315[1/], when the other candidates are included? Relying on this Court's holding in *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), the District Court concluded that neither claim had merit, that the Communications Act cannot be enforced through a § 1983 action, and that Forbes had failed to state a claim under 42

1/ 47 U.S.C. § 315(a) provides that any person legally qualified as a candidate for public office shall be afforded the same opportunities as all other candidates for that office. However,

> No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any –
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary . . . or
> (4) on-the-spot coverage of bona fide news events . . .
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

47 U.S.C. § 315(a).

U.S.C. § 1981, § 1985, or the First and Fourteenth Amendments. We now affirm in part and reverse in part.

I.

In 1992, Ralph Forbes was an independent candidate for United States Representative for the Third Congressional District of Arkansas. He had obtained enough signatures to qualify for the ballot under state law. One of the defendants, the Arkansas Educational Television Network (AETN), is an instrumentality of the State of Arkansas. The other defendants are private television stations that broadcast in the Third Congressional District.

A few weeks before the general election on November 3, 1992, Forbes sued AETN and its agents (collectively the AETN defendants) alleging that AETN planned to sponsor a debate among the candidates for the Third Congressional District seat, but that it intended to include only the two major-party candidates. Forbes alleged that since he had qualified for the ballot as an independent candidate, he had a right to be included in the debate or, in the alternative, a right to additional air time on AETN to express his views, as required by the equal-time provision of 47 U.S.C. § 315. He claimed that AETN had denied him access to air time because of his political beliefs. Forbes also alleged that AETN's actions were taken in violation of 42 U.S.C. § 1981 *et seq.*, and that his First Amendment rights had been violated. Finally, Forbes alleged that his exclusion from the debates had deprived "the people" of their right to vote, and he sought declaratory and injunctive relief as well as compensatory and punitive damages.

Forbes alleged that he asked AETN to include him in the debate or give him additional time, and that his request

was refused. He then telephoned the Federal Communications Commission and claimed that an FCC representative told him to "go through the motions" of a proper complaint, although it would be a waste of time. Believing that pursuit of his claim through the FCC would be pointless, Forbes wrote the FCC to request that his complaint be denied speedily so that he could seek an injunction in court. Instead, the FCC responded with a letter enclosing a statement of applicable law as well as instructions on how to file a complaint with the FCC. Forbes claims that he never received the enclosed materials, although he acknowledges receipt of the letter.

Forbes then sought injunctive relief in the District Court and moved for a preliminary injunction to mandate his inclusion in the debate. He alleged that AETN's reasons for excluding him from the debate were discriminatory and were specifically designed to keep the public from learning of Forbes's views on certain policy issues. In support of this position, Forbes claimed that an official of AETN stated that the network would run "St. Elsewhere" rather than a debate that included Forbes, and that another official of AETN stated that Forbes had not been included because he was not a "serious" candidate.

The District Court denied the request for injunctive relief on October 20, 1992. On October 21, 1992, sitting as a single circuit judge, the writer of this opinion denied Forbes's request for an injunction pending appeal. The next day, a panel of this Court declined to disturb that action. The basis for both rulings - that of the panel and that of the single judge - was that *DeYoung v. Patten*, *supra*, was controlling Circuit precedent and directly in point against Forbes.

On November 2, the day before the election, Forbes amended his complaint to include private television stations KHBS-TV and KHOG-TV, the American Broadcasting Company, and their agent, Darrel Cunningham (collectively "the private stations"), as defendants. In his amended complaint, Forbes alleged that the private stations had violated the provisions of the Communications Act by refusing to air one of his anti-abortion advertisements except during the "safe-harbor" hours of 11:00 p.m. to 6:00 a.m. without first making a determination that the ad was indecent. Forbes alleged a criminal conspiracy, "RICO treble damages," and violations of 42 U.S.C. § 1981 *et seq.*, and claimed the private stations' actions also were in violation of 47 U.S.C. § 315. He renewed his claims against AETN defendants.

The AETN defendants filed a Rule 12(b)(6) motion, arguing that Forbes had no First or Fourteenth Amendment right to appear in a televisions debate, that he had no personal claim or cause of action under 47 U.S.C. § 315 to appear on television, that he failed to state a claim under 42 U.S.C. § 1981, and that he failed to state a cause of action against the AETN defendants. The private stations also moved for dismissal under Rule 12(b)(6), arguing that the District Court had no subject-matter jurisdiction under the Communications Act, and that Forbes has failed to exhaust his administrative remedies. The District Court, after properly setting forth the standard for granting a Rule 12(b)(6) motion, concluded that the standard had been met by both sets of defendants. It concluded, following this Court's holding in *DeYoung v. Patten*, *supra*, that Forbes had no right of access to the public airways, that no implied right of action exists under the Communications Act, and that § 1983 cannot be used to enforce the rights granted by 47 U.S.C. § 315. Additionally, the Court concluded that the

complaint contained only vague allegations of conspiracy that failed to state a claim under 42 U.S.C. § 1985.

II.

In reviewing a dismissal for failure to state a claim, we take the allegations well pleaded in the complaint as true. Motions to dismiss should not be granted unless it is clear beyond doubt that there is no set of facts the plaintiff could prove that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Forbes has raised three claims in his complaint. First, as against both the AETN defendants and the private stations, Forbes has claimed violations of 47 U.S.C. § 315 and a conspiracy under 42 U.S.C. § 1985. Second, Forbes has additionally claimed against AETN a § 1983 violation for failing to provide him with equal time as required by § 315. Finally, Forbes has alleged that AETN violated the First and Fourteenth Amendments by failing to include him in the debate.

A. Statutory Claims

First, with respect to Forbes's statutory claim, we agree with the District Court and the private stations that Forbes's complaint cannot stand. There is no private cause of action to enforce 47 U.S.C. § 315, and Forbes's proper course of action is to bring his claim before the Federal Communications Commission. Forbes failed to exhaust his administrative remedies; therefore, his claim that the private stations improperly refused to run his anti-abortion advertisement outside of safe-harbor hours was not properly before the District Court. Additionally, Forbes's claim that AETN improperly refused to grant him equal time, as required by § 315, likewise should have been brought before the FCC first and then appealed, if necessary, to a court of

competent jurisdiction. See *DeYoung*, 898 F.2d at 633-35. (We adhere to this aspect of *DeYoung*.) Since Forbes has failed to exhaust his administrative remedies, the District Court was correct in declining to rule on his statutory claims.

We further agree with the District Court that there is insufficient substance to Forbes's conspiracy claim to entitle him to relief under 42 U.S.C. § 1985. We also affirm the District Court's ruling that the failure to allege racial discrimination bars his claim under § 1981. Finally, we agree with the District Court that § 1983 is not available to enforce Forbes's claims under § 315 of the Communications Act, since that provision itself contains the remedy for its violation - a petition to the FCC. Nonetheless, we disagree with the District Court with regard to Forbes's constitutional claims, and now hold that Forbes did allege a First Amendment violation well enough to survive a motion to dismiss. We now turn to this claim.

B. First Amendment Claim

The District Court dismissed Forbes's First Amendment claim on the authority of this Court's holding in *DeYoung*, 898 F.2d 632, that "[a] political candidate does not have a 'constitutional right of broadcast access to air his views.'" *Id.* at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. Cir. 1980). The Court concluded that the only claim Forbes had to warrant his inclusion in the debate was under the equal-time provision of the Communications Act. Since there was no private right of action under the Communications Act, nor was § 1983 available to enforce its provisions, Forbes's only remedy was through the FCC. Letter from the District Court to All Counsel of Record at 4, citing *DeYoung*, 898 F.2d at 634.

Generally speaking, it is true that a candidate does not have the right to demand air time. See *Kennedy* for President Comm., *supra*.[2/] Under the circumstances of the present case, we hold that Forbes did have a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny. In *DeYoung*, this Court concluded that a public television station, such as AETN, was a state actor. *DeYoung*, 898 F.2d at 631-32. We adhere to this conclusion. AETN is not a private entity, it is a state-owned television network, therefore, actions taken by the station, as well as actions taken by its employees and representatives, are fairly attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees.

2/ In *Kennedy*, the FCC had denied a candidate's request for an opportunity to respond to the President's statements in a press conference. Since the press conference was a bona fide news event, and, therefore, the equal-time provision of the Communications Act was not triggered, the candidate argued that he had a First Amendment right to respond. The Court concluded that since there was no absolute right of access to the airways, the provisions of § 315 excluding bona fide news events from its requirements was not in violation of the First Amendment. *Kennedy*, 636 F.2d at 432. As a general rule, we agree with this principle - there is no First Amendment right to appear on television upon demand. However, the stations involved in *Kennedy* were private stations. See *Id.* at 419-20. In the present case, the fact that AETN is a public station and did, Forbes alleges, sponsor its own debate alters the analysis significantly.

As a state actor, AETN is faced with constraints not shared by other television stations. When it comes to the First Amendment claim, we conclude that *DeYoung* was wrongly decided. *DeYoung* holds that no First Amendment right to appear in a televised debate exists, at least beyond that given by § 315, *DeYoung*, 898 F.2d at 633-35, and that the only remedy available to a candidate in Mr. Forbes's position is to seek remedial action through the FCC. This holding would allow a state-owned station to exclude all Republicans, or all Methodists, or all candidates with a certain point of view, except to the extent, if any,[3/] that the excluded candidates could obtain relief under the Communications Act. We believe the error of such a proposition is self-evident. The state may not, by statute or otherwise, take such a discriminatory action, absent a compelling state interest.

The AETN defendants suggest that the case should be governed by public-forum analysis. If it is, the same conclusion follows: a state agency does not have an absolute right to determine which of the legally qualified candidates for a public office it will put on the air. The reason for such an exclusion must be ascertained and measured against First Amendment standards.

3/ Regardless of the sponsor, the FCC has allowed non-inclusive debates to be broadcast over public stations. See *In re Sagan*, 1 FCC Rcd 10 (1986). The deference we give administrative agencies on questions of statutory interpretation does not extend to constitutional issues. See *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, 492 n.4 (Clark, J., dissenting), *cert. denied*, 112 S.Ct 71 (1991).

In its discussions of public versus nonpublic fora, the Supreme Court has divided government property into roughly three categories. The first is the traditional public forum, such as the town square, "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Education Assn. v. Perry Local Engineers' Assn.*, 460 U.S. 37, 45 (1983). Public television stations do not fit into this category - there is no unlimited right of access to the airwaves. The second category is the limited public forum, a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), a limited topic, or a limited class of speakers. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the Third Congressional seat. This is a determination the factfinder would have to make after carefully looking at the nature of the debate forum. If it were determined that AETN had created a limited public forum, then Forbes would have a First Amendment right to participate in the debate and could be excluded only if AETN had a sufficient government interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry*, 460 U.S. at 45.

The third category of governmental property is the nonpublic forum, which consists of property not usually compatible with expressive activity. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). Even in the context of the nonpublic forum certain minimum First Amendment requirements apply:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. at 806 (citations omitted). Since Forbes was a member of the class of speakers for whose benefit the debate was held (candidates for the Third Congressional seat), and he wished to address the topic encompassed by the debate (who should be elected to Congress), if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights.4/ See *Gay & Lesbian Students*

4/ AETN and the Public Broadcasting System amici cite other circuits which they say have concluded otherwise. Most significantly, they cite *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987); *Chandler v. Georgia Public Telecommunications Comm'n.*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991); and *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). These cases do not precisely address the case before us. *Chandler* involved a factual situation similar to that in the case at bar; (continued...)

Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988) (while there is no First Amendment right to receipt of public school funds, a state school is not permitted to refuse funding because it disagrees with an organization's message). It should be noted that the Public Television Station amici acknowledge that AETN does not have the right to exclude Forbes simply because they disagree with his point of view. Certainly, were the answer otherwise, there would be nothing to prevent the party in power from excluding all opposing parties, or particular religions, or minorities from public-television-sponsored debates.

III.

AETN has not filed an answer to Forbes's complaint; therefore, it has not yet articulated any principled reason for excluding Forbes. See *Cornelius*, 473 U.S. at 811 ("existence of reasonable grounds for limiting access to a

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4/ (...continued)
however, the Georgia Public Telecommunications Commission had offered the candidates there thirty minutes of air time to respond to the debate from which they were excluded, something AETN allegedly refused to do for Forbes. Additionally, we respectfully disagree with the Eleventh Circuit's conclusion that the First Amendment was not implicated by the Georgia public television station's actions. See *Chandler*, 917 F.2d at 490-94 (Clark, J., dissenting). *Muir* did not involve a debate at all, but rather an attempt by Alabama and Texas public television viewers to force their public television stations to air a particular show. *Muir* correctly assesses the right of the public to have access to air time, but does not address the situation facing us here. *Johnson* involved a broadcast debate sponsored by a third party, not by a public television station.

nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination"). AETN must provide a rational and viewpoint-neutral justification for its determination. On this record, AETN has not yet done so; therefore, Forbes has stated a claim upon which relief can be granted, especially if we credit Forbes's allegation, as we must in reviewing a Rule 12(b)(6) dismissal, that AETN planned to air "St. Elsewhere" rather than allow Forbes to debate.

So much of the judgement as dismissed Forbes's statutory claims is affirmed. So much of the judgement as dismissed his claim under the First and Fourteenth Amendment for failure to state a claim is reversed, and the cause is remanded for further proceedings consistent with this opinion. That portion of *DeYoung v. Patten* which holds that the First Amendment places no restraint, beyond that imposed by the Communications Act, on the right of state agencies to sponsor candidate debates and pick and choose which candidates may take part, is overruled.[5/]

It is so ordered.

McMILLIAN, Circuit Judge, joined by JOHN R. GIBSON, Senior Circuit Judge, FAGG, MAGILL, and HANSEN, Circuit Judges, concurring in part in dissenting in part.

Although I agree with most of the majority opinion, for the reasons discussed below, I would affirm the order of the

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5/ Our holding applies only to debates that are sponsored by state instrumentalities. It does not apply to private-television-sponsored debates, nor to debates sponsored by third parties that are reported in good faith by public television stations.

district court dismissing Forbes's complaint. Accordingly, I concur in part and dissent in part.

It has been an instructive experience to reconsider these issues. As a preliminary matter, however, I would hold that the FCC has exclusive jurisdiction of this litigation, including both the statutory and the constitutional claims, with the judicial review in the court of appeals and then the Supreme Court. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); see also *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Forbes should have taken his complaints to the FCC in the first instance. Litigation in the district court is inconsistent with and necessarily undermines the exclusive jurisdiction of the FCC.

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved [since 1927] . . .

. . . The judgment of the Legislative Branch cannot be ignored or undervalued simply because [Forbes has cast his] claims under the umbrella of the First Amendment. That is not to say that we "defer" to the judgement of the Congress and the [Federal Communications] Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.

Columbia Broadcasting System, Inc. v. Democratic National Comm., 412 U.S. at 102-03.

It may be true that the FCC is not as vigilant or as sensitive to first amendment interests as it should be. *See Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1056-57 (5th Cir. 1982) (banc) (Frank M. Johnson, Jr., J., dissenting), *cert. denied*, 460 U.S. 1023 (1983). It may also be true that technological changes since the Supreme Court decided *Red Lion Broadcasting Co. v. FCC* in 1969 have largely undermined the basis for the existing pervasive federal regulation of the broadcasting industry as a whole and, as a result, "raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today." *See Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442 (8th Cir. 1993) (banc) (Richard S. Arnold, C.J., concurring in the judgment). However, absent such developments, I would require Forbes to raise both his statutory and constitutional claims in proceedings before the FCC and not as an original matter in the district court.

Assuming the district court did have jurisdiction, I agree the district court correctly dismissed Forbes's 42 U.S.C. § 1985 civil conspiracy claim because his allegations were too vague and his 42 U.S.C. § 1981 claim because he failed to allege discrimination on the basis of race. Slip op. at 7. I also agree the district court correctly dismissed Forbes's Federal Communications Act claims against the AETN defendants for excluding him from the debate and for refusing him air time and against the private stations for refusing to broadcast his political advertisements except during the safe-harbor hours. *Id.* at 6. The district court lacked subject matter jurisdiction over these claims. Forbes should have taken these complaints to the FCC first. Forbes did not do so. The FCC has considered complaints

involving candidate debates as well as complaints involving anti-abortion advertisements. Then, had the FCC ruled against him, Forbes could have sought judicial review in the court of appeals, not the district court. *DeYoung v. Patten*, 898 F.2d 628, 633-34 (8th Cir. 1990) (no implied private right of action). I also agree that Forbes cannot use 42 U.S.C. § 1983 to enforce these statutory claims. Slip op. at 7; *DeYoung v. Patten*, 898 F.2d at 634-35 (§ 1983 remedy foreclosed by comprehensive enforcement mechanism).

With respect to Forbes's first amendment claim, I also agree that there is state action for the purposes of § 1983 because AETN is an instrumentality of the state. It is a state-owned, non-commercial, public television station; its employees are state employees who are represented in this appeal by the state attorney general. Slip op. at 8; *DeYoung v. Patten*, 898 F.2d at 631-32. I do not agree, however, that Forbes, even though he was a legally qualified candidate, had a first amendment right to be included in the candidate debate or that the candidate debate was a public forum for first amendment purposes. In my view, the candidate debate was a nonpublic forum. Like private commercial television, public television is not a traditional public forum; it does not extend a general invitation to the public to appear on or participate in its programs. Nor do I think the candidate debate was a limited or quasi-public forum; the format of this candidate debate was not compatible with either unrestricted public access or with unrestricted access by all of the legally qualified candidates. For this reason, I would hold that the candidate debate was a nonpublic forum.

"Control over access to a nonpublic forum can be based on . . . speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense*

& Education Fund, 473 U.S. 788, 806 (1985) (citations omitted). Presumably, AETN decided to limit the number of candidates in order to maintain a traditional debate format, rather than to expand the format to a panel discussion. Because AETN has yet to file an answer, AETN's reasons for designing the format of the candidate debate as it did are not known. However, it would not have been unreasonable or viewpoint-specific for AETN to have limited the candidate debate to only the two major party candidates, thus excluding minor party candidates and independent candidates, or, for that matter, to the two candidates who had the most support or who appeared to have the most likely chance of winning, for example, on the basis of poll results. It may not have been good programming, or even good politics, given voters' interest in and the occasional historical success of minor party and independent (and even fringe) candidates, to limit the candidate debate to the two major party candidates. Nonetheless, I would hold that AETN had the editorial and programming discretion to structure the candidate debate along those lines and that excluding Forbes from the candidate debate for those reasons would be viewpoint neutral.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3374WA

Ralph P. Forbes,	*	
	*	
Appellant,	*	
	*	
v.	*	On Appeal from the United
	*	States District Court
	*	for the Western District
Arkansas Educational	*	of Arkansas.
Television Communication	*	
Network Foundation, et al.,	*	
	*	
Appellees.	*	

Filed: October 22, 1992

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and JOHN R.GIBSON, Circuit Judges.

PER CURIAM.

The panel has before it the request of appellant that we review the order entered yesterday by Chief Judge Arnold, sitting as a single circuit judge.

We have considered the relevant materials, including the order of the District Court. Both the District Court and Chief Judge Arnold considered themselves bound by *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). So do we. This case is dispositive and is precedent binding on this panel.

The motion for injunction pending appeal is denied. The panel declines to set aside the order entered by Chief Judge Arnold as a single circuit judge. The order of the District Court, denying preliminary injunctive relief, is summarily affirmed. We direct that our mandate be issued forthwith.

The appellant Forbes is of course at liberty to file a timely petition for rehearing with suggestion for rehearing en banc. It will not be practical, however, for such a petition to be ruled on today. Accordingly, the defendants are free to proceed with the televised debate tonight in accordance with their plans.

It is so ordered.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3274WA

Ralph P. Forbes,	*	
	*	
Appellant,	*	
	*	On Motion for Injunction
	*	Pending Appeal from the
v.	*	United States District Court
	*	for the Western District
	*	of Arkansas
Arkansas Educational	*	
Television Communication	*	
Network Foundation,	*	
et al.,	*	
	*	
Appellees.	*	

Filed: October 21, 1992

Before RICHARD S. ARNOLD, Chief Judge.

ORDER

This matter was heard in chambers by me as a single circuit judge, upon the application of the appellant for injunctive relief pending appeal. After a full argument and discussion of all of the issues, I denied the motion. The reasons are fully stated on the record, and a transcript of the proceedings, including the reasons for the decision, is available to either side by arrangement with the Court Reporter.

The most important point, in my view, is that the plaintiff-appellant has only a small chance of prevailing on the appeal, under the controlling precedents of this Court, especially *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). This case appears to be a conclusive precedent against most of the appellant's theories, and it of course binds me, as it bound the District Court.

I have instructed the Clerk to submit the matter of injunctive relief pending appeal to a panel of three judges, including me. The panel will endeavor to rule on the question before the television debate in question, which is scheduled for 7:00 p.m. on the evening of Thursday, October 22, 1992. I have explained to both sides that my ruling is provisional only, and that the panel can overturn it.

Motion denied.

/s/ Richard S. Arnold
Richard S. Arnold, Chief Judge
United States Court of Appeals
for the Eighth Circuit

APPENDIX H

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULES

The Arkansas Code, Chapter 3, provides:

6-3-101. Creation.

There is created an agency to be known as the Arkansas Educational Television Commission, hereinafter called "the commission."

6-3-102. Members.

(a)(1) The commission shall consist of eight (8) members, who shall be residents and qualified electors of the State of Arkansas, with at least one (1) member being appointed from each of the congressional districts of the state.

(2) At least one (1) member shall be a person who is actively engaged in the field of education in the public school system of this state, and one (1) member shall be a person actively engaged in education in an institution of higher learning in this state.

(3) No member of the commission shall hold another office of profit or trust under the United States, the State of Arkansas, or any political subdivision thereof, or any office or employment paid in whole or in part by any funds derived from tax sources, except persons actively engaged in the field of education in the public schools or institutions of higher learning in this state.

(4) No member of the commission shall have any financial interest in any facilities such as the commission is authorized to deal with, including any interest in any commercial television or radio station.

(b)(1) Commissioners shall be appointed by the Governor with the advice and consent of the Senate for terms of eight (8) years.

(2) Commissioners shall be eligible for reappointment.

(3) If a vacancy occurs at a time when the Senate is in session, the Governor shall, with the advice and consent of the Senate, appoint another commissioner for the unexpired term.

(4) If a vacancy occurs when the Senate is not in session, the Governor shall appoint a commissioner who shall take office immediately, but his appointment shall be subject to confirmation by the Senate at the next session of the General Assembly.

(5) If the appointment of such commissioner is confirmed by the Senate, he shall serve the remainder of the unexpired term.

(c) Each member shall be entitled to receive fifty dollars ($50.00) for each day actually in attendance at commission meetings, plus reimbursement for actual, reasonable, and necessary expenses for meals, lodging, and related expenses in attending board meetings, or other official travel in behalf of the commission, and shall be entitled to mileage at the rate provided by law or regulation for travel by state employees for official travel.

6-3-103. Organization -- Rules and regulations.

(a) Promplty after their appointment, the commissioners shall meet to organize.

(b) At the meeting they shall choose from their number a chairman, a secretary, and such other officers as they deem necessary.

(c) Thereafter officers shall be elected annually.

(d) The commission shall adopt rules regulating the conduct of its meetings and the transaction of the business of the commission.

6-3-104. Agents and employees.

(a) The commission may appoint such agents and employees as it deems necessary or may delegate to one (1) or more of its members, officiers, agents, or employees such powers and duties as it deems proper and is authorized to do by legislation.

(b)(1) The commission is authorized to contract with other educational institutions in this state for the employment and use, on a contract basis, of the full-time or part-time services of employees of those educational institutions and may pay for their services in accordance with the provisions of such contracts.

(2) In the event the Arkansas Educational Television Commission shall determine that the use of full-time or part-time services of employees of such other educational institutions in this state shall make it necessary that payment therefor be from funds appropriated for the commission for

the payment of regular salaries of employees of the commission, upon certification of the amount to the Chief Fiscal Officer of the State the amount shall be transferred from the appropriation made for regular salaries of the commission for the fiscal year involved to the appropriation for maintenance and general operation of the commission for such fiscal year and may be expended for payments under contracts as authorized herein.

6-3-105. Purpose -- Powers and duties generally.

(a) The commission is organized for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Arkansas.

(b) To this end, it is empowered and directed to survey, study, and appraise the need for an overall plan for the use of television facilities available for noncommercial educational use in the state.

(c) The commission is specifically charged with the duty of controlling and supervising the use of channels reserved by the Federal Communications Commission to Arkansas for noncommercial educational use.

(d) It may designate the location of stations to utilize such channels and make rules and regulations governing the operation of these stations and the programs televised over these channels. The commission may own and operate television stations to utilize these channels, or it may contract with individuals, corporations, educational institutions, or other governmental agencies for the operation of such stations.

6-3-106. Execution of contracts.

The commission is authorized to execute all contracts and other instruments necessary an convenient to carry out the mandates of this chapter.

6-3-107. Acceptance of gifts or grants.

(a) The commision may solicit and accept gifts or grants of money, real or personal property, and voluntary and uncompensated services from any person, federal or other governmental agency, board of education, educational institution, or commercial or industrial enterprise.

(b) Any gifts and grants of money and any moneys derived from the sale of real or personal property donated to the commison may be placed in a bank in this state and may be disbursed by the commission for the purposes for which the gifts, grants, or real or personal property was donated or granted.

6-3-108. Equipment -- Limits on commission responsibility.

After receipt of any equipment furnished or installed by the Educational Television Commission, the commission will not be responsible:

(1) For additional reception problems which may occur; or

(2) For replacement of any of the furnished equipment.

6-3-109. Revolving cash fund.

(a) The commission is authorized to establish in a bank authorized to do business in this state, selected by the commission, a revolving cash fund into which the commission shal pay all funds received from the sale of instructional materials prepared by the commission or purchased by the commisson and sold to schools in this state in connection with educational television programs.

(b) In addition, the commission is authorized to expend from the revolving cash fund amounts necessary to purchase instructional materials for sale to schools to be used for educational television purposes, including the cost of freight, postage, handling, and other delivery costs incidental to the purchase or sale.

(c) The commission shall keep a complete record of all receipts and expeditures from the revolving cash fund and shall make the record available to the legislative auditors for audit and verification.

6-3-110. Appropriation and annual auit – State employees.

(a) No appropriation made availabe to the Arkansas Educational Television Commission or the Division of Educational Television of the State Department of Education shall be available until such time as the Chairman of the Arkansas Educational Television Commission certifies, in writing, to the Legislative Joint Auditing Committee that an audit is being conducted of the Arkansas Educational Telecommunications Network Foundation for the previous fiscal year and has promptly been made available to that committee.

(b) At the end of each fiscal year, the chairman of the commission shall initiate an audit of the Arkansas Educational Telecommunications Network Foundation by a recognized and certified public accounting firm acceptable to the Legislative Auditor with such audit standards and schedules that may be promulgated by the Legislative Auditor, such audit to be paid for by the Arkansas Educational Telecommunications Network Foundation.

(c) No person employed by the Arkansas Educational Television Commission and paid from state funds shall receive supplemental compensation or remuneration from funds not appropriated by the state.

(d) State employees of the Division of Arkansas Educational Television, in fulfilling their day-to-day responsibilities, are to be supervised only by appropriate state employees, and, to that end, no person or employee paid from funds not appropriated herein shall supervise any state employee as herein provided.

6-3-111. Budget requests.

The Director of the Educational Television Divison of the Department of Educational shall submit budget requests of the Educational Television Division of the State Board of Education and the Director of the Department of Education, General Education Division, for their review and approval, before the budget submissions are forwarded to the Governor and the Arkansas Legislative Counsel.

6-3-112. Authorization for lease of facilities.

(a) The Arkansas Educational Television Commission is authorized and empowered to arrange for the

use of its facilities, including, without limitation, tower space, studios, and equipment, by any federal, state, or local governmental agency or by any other person, from time to time, as any of such facilities are not needed by the commission, and to collect fees and charges, as the commission determines to be reasonable, in connection with the use of any such facilities by any other person; provided, however, agencies and educational institutions of the State of Arkansas shall have preference for the use of commission facilities over other entites and persons and shall be asesed fees and charges at preferential rates as determined by the commission.

(b) The commision shall be exempt from complying with general provisions of other laws dealing with public commodities and facilities and their acquisition, leasing, or disposition in relation to the use of its studios by other persons in such cases, as advertising for bids would be impractical because of time limitations.

(c) Any revenue received by the comission from the use of its facilities by other persons shall be cash funds pursuant to § 6-3-109.

(d) The commission is authorized to promulgate such regulations as it deems necessary for the implementation of this section.

6-3-113. Eminent domain power.

(a)(1) The Arkansas Educational Television Commission is hereby granted the right of eminent domain to condemn real property leased or rented by the commission if the property is deemed to be necessary or desirable by the commission for making the benefits of educational television

available to the citizens of Arkansas or to otherwise carry out the purposes of § 6-3-101 et seq., and if the commission is unable to agree with the owner of the land, or if, by legal incapacity or absence of the owner, no agreement can be made for the purchase.

(2) All suits for condemnation of real property under the provisions of this section shall be brought by the Arkansas Educational Television Commission in the name of the State of Arkansas.

(3) The real property may be acquired in fee simple or in any lesser estate.

(b) The commission is authorized to make payment for real property acquired under the provisions of this section out of any appropriation made for the Arkansas Educational Television Commission. No land shall be taken or contracted to be taken of an amount beyond the sum available therefor.

(c) The commission shall exercise the power of eminent domain in the manner provided for in § 27-67-311 et seq.

(d) Actions by the commission to condemn real property shall be brought in the county in which the land is situated. If the land is located in more than one (1) county, the action may be brought in any county in which the land is situated.

The Arkansas Code, Chapter 16, provides:

25-16-804. Removal and replacement.

(a)(1) As used in this section, unless the context otherwise requires, "good cause" includes:

(A) Conduct constituting a criminal offense involving moral turpitude;

(B) Gross dereliction of duty; or

(C) Gross abuse of authority.

(2) "Good cause" does not include any vote, decision, opinion, or other regularly performed or otherwise reasonably exercised power of a board or commission member.

(b)(1) The Governor may remove, for good cause, a state board or commission member whose office or position is filled by gubernatorial appointment, subject to confirmation by the Senate. If the Senate is not in session, confirmation shall be by written petition of a majority of the Senators.

(2) The Governor may appoint a qualified individual to replace the board or commision member removed to serve the remainder of his term, subject to confirmation by the Senate under circumstances where confirmation is normally required.

(c) All orders of removal by the Governor shall be in writing shall be delivered to the member removed or counsel for the member, and shall specifically set out the grounds relied upon for removal.

(d)(1) A removed board or commission member may institute proceedings for review by filing a petition in the Circuit court of Pulaski County within thirty (30) days after delivery to him or his attorney of the Governor's order of removal.

(2) This petition shall not supersede or stay the order of removal, nor shall any court enter an order to this effect or one which would impair the authority of the Governor to appoint a replacement whose service begins immediately upon fulfillment of the normal requirements for assuming office.

(e)(1) When the matter is heard by the Circuit Court of Pulaski County, it shall be tried *de novo* without a jury.

(2) The Governor shall have the burden of proof to show by clear and convincing evidence that good cause existed for removal of the board or commission member in question from office and for revoking his commission.

(3) If the court determines that good cause has been shown, it shall enter an order removing the board or commision member in question from office and revoking his commission. If the Court determines that good cause has not been shown by clear and convincing evidence, the court shall order the removed member reinstated to his position and, upon request, shall aware a reasonable attorney's fee and court costs to the reinstated party.

(f)(1) Subject to the restrictions of subsection (d) of this section on supersedeas or stay orders, a removed board or commision member may appeal the decision of the circuit court to the Arkansas Supreme Court.

(2) The Governor may appeal the decision of the circuit court to the Arkansas Supreme Court, but the appeal shall not preclude the circuit court, in its discretion, from entering an order reinstating the removed member.

(g) No board or commission action in which the appointed replacement participates shall be void, voidable, or in any way subject to invalidation on grounds of participation of the appointment replacement or lack of participation by the removed member in the event that the circuit court or the Arkansas Supreme Court orders the removed member reinstated.

The First Amendment to the Constitution of the United States provides:

Congress shall make no law respecting an establishmet of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

47 U.S.C. § 153 provides:

For the purposes of this chapter, unless the context otherwise requires --

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or

foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, he deemed a common carrier.

47 U.S.C. § 309 provides:

(a) Consideration in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which seciton 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 312 provides:

Administrative Sanctions (a) The commission may revoke any station license or construction permit --

. . . (7) for willful or repeated failure to allow reasonable access to or to permit pruchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

47 U.S.C. § 315 provides:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a

broadcasting station, he shall afford equal opportunites to all other such candidates for that office in the use of such broadcastng station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

47 U.S.C. § 402 provides:

(a) *Procedure.* Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 C.F.R. § 73.1941 provides:

(a) *General requirements.* Except as otherwise indicated in § 73.1944, no station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunites to all other candidates for that office to use such facilities. Such licensee shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any:

(1) Bona fide newscast;

(2) Bona fide news interview;

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(4) On-the-spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of broadcasting station. (section 315(a) of the Communications Act.)

(b) *Uses.* As used in this section and § 73.1942, the term "use" means candidate appearance (including by voice or picture) or political advertisement that is not exempt under § 73.1941(a)(1)-(4) and that is controlled, approved or sponsored by the candidate or the candidate's authorized Committee after the candidate becomes legally qualified.

(c) *Timing of request.* A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred: Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(d) *Burden of proof.* A candidate requesting equal opportunities of the licensee or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(e) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or

make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for hte same public office.

47 C.F.R. § 73.1944 provides:

(a) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) *Weekend Access.* For purposes of providing reasonable access, a licensee shall make its facilities available for use by federal candidates on the weekend before the election if the licensee has provided similar access to commercial advertisers during the year preceding the relevant election period. Licensees shall not discriminate between candidates with regard to weekend access.

APPENDIX I

Statement of Principles of Editorial Integrity in Public Broadcasting

Developed by
The Editorial Integrity Project

Jolly Ann Davidson, Chair
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Printed with funds provided by
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Statement of Principles of Editorial Integrity in Public Broadcasting

The mission of public broadcasting is to bring to Americans the highest accomplishments of our society and civilization in all of its rich diversity, to permit American talent to fulfill the potential of the electronic media to educate and inform, and to provide opportunities for diverse groups of the American people to benefit from programming unavailable from other sources.*/

The basis of public broadcasting's mission lies in the Communications Act of 1934 as amended in 1967. Congress determined that Americans' general welfare would be furthered by encouraging public telecommunications services responsive to the people's interests. Congress also found that supporting public telecommunications was an important concern of the federal government, and that developing public broadcasting programming depended on freedom, imagination and initiative on both local and national levels.**/

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*/ *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting*. Bantam: New York, 1979.

**/ Communications Act of 1934, as amended, Sec. 396: (a) The Congress hereby finds and declares that --

(1) It is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

(2) It is in the public interest to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications

(continued...)

No one is more important to the fulfillment of public broadcasting's mission than the men and women serving on the boards of trustees of local licensee stations. So that the trustees can make the best decisions on issues affecting the licensee, they must encourage both comments and criticism from citizens' groups and public representatives. Trustees need to assure they are responsive to the needs of the public in a responsible manner. Each board should have a public

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**/ (...continued)
services;

(3) Expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;

(4) The encouragement and support of public telecommunications, while matters of importance for private and local development, are also of appropriate and important concern to the Federal Government;

(5) It furthers the general welfare to encourage public telecommunications services which will be responsive to the interest of people both in particular localities and throughout the United States, which will constitute and expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation;

(6) It is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States; and

(7) A private corporation (the Corporation for Public Broadcasting) should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control.

policy stating the principles by which it intends to conduct the business of the licensee, including the solicitation of public comment. That policy should recognize the taxpayers' right to criticize the public broadcasting agency.

Trustees are also responsible for guarding public broadcasting's editorial integrity and its reputation. Editorial integrity in public broadcasting programming means the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens. Programming based on the principles of editorial integrity will guarantee journalistic objectivity, as well as a fair and balanced presentation of issues.

In order to assure that programs meets the standards of editorial integrity the public has a right to expect, the following five principles and guidelines establish a foundation for trustee action. The principles and guidelines also form a basic standard by which the services of a public broadcasting licensee can be judged. At the same time, they form a basis for evaluating all aspects of public broadcasting station's governance, form enabling legislation to the policy positions of the licensee board. The ultimate goal of the principles and guidelines is to assist public broadcasting trustees in fulfilling their vital role in this important public service.

I. We Are Trustees of a Public Service.

Public broadcasting was created to provide a wide range of programming services of the highest professionalism and quality which can educate, enlighten and entertain the American public, its audience and source of support. It is a noncommercial enterprise, reflecting the worthy purpose of the federal and state governments to provide education and cultural enrichment to their citizens.

As trustees of this public service, part of our job is to educate all citizens and public policy makers to our functions, and to assure that we can certify to all citizens that station management responsibly exercises the editorial freedom necessary to achieve public broadcasting's mission effectively.

II. Our Service Is Programming.

The purpose of public broadcasting is to offer its audiences public and educational programming which provides alternatives in quality, type and scheduling. All activities of a public broadcasting licensee exist solely to enhance and support excellent programs. No matter how well other activities are performed, public broadcasting will be judged by its programming service and the value of that service to its audiences.

As trustees, we must create the climate, the policies and the sense of direction which assure that the mission of providing high quality programming remains paramount.

III. Credibility Is the Currency of our Programming.

As surely as programming is our purpose, and the product by which our audiences judge our value, that judgment will depend upon their confidence that our programming is free from undue or improper influence. Our role as trustees includes educating both citizens and public policy makers to the importance of this fact and to assuring that our stations meet this challenge in a responsible and efficient way.

As trustees, we must adopt policies and procedures which enable professional management to operate in a way which will give the public full confidence in the editorial integrity of our programming.

IV. Many of our Responsibilities Are Grounded in Constitutional or Statutory Law.

Public broadcasting stations are subject to a variety of statutory and regulatory requirements and restrictions. These include the federal statute under which licensees must operate, as well as other applicable federal and state laws. Public broadcasting is also cloaked with the mantle First Amendment protection of a free press and freedom of speech.

As trustees we must be sure that these responsibilities are met. To do so requires us to understand the legal and constitutional framework within which our stations operate, and to inform and educate those whose position or influence may affect the operation of our licensee.

V. We Have a Fiduciary Responsibility for Public Funds.

Public broadcasting depends upon funds provided by individual and corporate contributions; and by local, state and federal taxes. Trustees must therefore develop and implement policies which can assure the public and their chosen public officials alike that this money is well spent.

As trustees, we must assure conformance to sound fiscal and management practices. We must also assure that the legal requirements placed on us by funding sources are met. At the same time, we must resist the inappropriate use of otherwise legitimate oversight procedures to distort the programming process which such funding supports.

We the undersigned subscribe to this Statement of Principles

Robert L. Allen*
Executive Director
Oklahoma Educational
Television Authority

Jolly Ann Davidson‡
Chair
Iowa Public Broadcasting
Board

Gerald L. Appy
Executive Director
Oregon Commission on
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Dave L. Fornshell
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Commission

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Pennsylvania Public
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Jerold A. Garber
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Nebraska Educational
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The Editorial Integrity Project

Guidelines to the Principles of Editorial Integrity in Public Broadcasting

Amid the pressures of great events, general principle gives no help.

--Hegel

No statement of principles can do more than give general guidance to the trustees charged with overseeing a public broadcasting service. It is only through practical experience, a thorough knowledge of the policies and purposes which guide the institution, and a commitment to preserving its values that those facing difficult choices can make judgments which best serve the institution.

I. We Are Trustees of a Public Service.

Board members have an absolute responsibility to serve as the public's trustees of a service providing educational, cultural and informational programs; and to protect the credibility of that public trust. Because of public broadcasting's broad and serious responsibilities, the structure and autonomy of its licensee boards is vitally important. The board can carry out these responsibilities effectively only if it is structured or convened solely to govern the public broadcasting enterprise.

The trustees are also responsible for protecting editorial integrity against undue influence from any source. Undue influence is any direct or indirect influence that seeks to leave the person with the assigned responsibility for programming decisions no alternative but to comply.

In order to serve the public by protecting editorial integrity, the trustees need to understand their vital role in this important enterprise. Dallin Oaks, chair of the PBS Board, defined it very clearly:

> First, boards must educate the public, public officials and policymakers in their chain of command so that they understand the need for educational freedom. Second, we need to assure and certify to public officials and to the public that editorial freedom is being exercised responsibly.*/

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*/ *Proceedings of the Wingspread Conference on Editorial Integrity in Public Broadcasting.* Southern Educational Communications Association; Columbia, S.C., 1985.

To do this, trustees must be sufficiently involved with their institutions to set policies responsive to the public need, yet sufficiently detached from operations to evaluate the service objectively.

Trustees are responsible for assuring that their enterprise provides services at a high level of quality and responsiveness to the public. To be responsive to the citizens they serve, the trustees must assure that there is a protocol to consider diverse views and opinions from the public. The station's chief executive officer is responsible for creating and maintaining open and effective communication channels with the public.

II. Our Service Is Programming.

The purpose of public broadcasting is to provide its audiences with programming of a quality, variety and type not readily available elsewhere. All other activities of a public broadcasting licensee should be defined by and secondary to that purpose, for the ultimate measure of its effectiveness is the success of its programming.

Audiences of all ages identify public broadcasting by the programs they use. To them, public broadcasting is not an institutional structure. It is the excellent national and local programs which provide them with educational, informational and cultural opportunities. Policies, procedures, goals, objectives and activities within a station should be defined by their contribution to the programming mission.

To ensure the best environment for good program decision-making, and to ensure fundamental security for editorial integrity, the station's chief executive officer should report directly to the licensee board, and should be responsible for developing and implementing objectives based upon service goals developed by the trustees.

III. Credibility Is the Currency of our Programming.

Programming is the purpose of public broadcasting and the product by which audiences judge its value. Audiences hold public broadcasting programs to a high standard of excellence and judge their public broadcasting operations by rigorous credibility criteria. Public broadcasters therefore must operate above suspicion of vulnerability to undue influence. Trustees are ultimately responsible for assuring the reality and the perception of credibility.

The process of developing programs to meet the audience's needs must function under clear policies adopted and regularly reviewed by the trustees. This process must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

To best assure that the trustees have the necessary authority to implement their responsibility in this area, the trustees should have the authority to hire, fire, and set compensation for the station's chief executive officer, within fiscal realities of the times and the market. The chief executive officer, in turn, should have authority to set qualifications for staff; to hire, fire, assign, and set compensation for staff; all within guidelines established by the trustees. The chief executive officer should also have the established authority to act in the absence of stated policies.

IV. Many of our Responsibilities Are Grounded in Constitutional or Statutory Law.

All broadcast licensees, public and commercial operate under strict legal guidelines and restrictions. The license under which all stations operate is granted by the Federal Communications Commission according to federal statutory terms of the Communications Act of 1934 and subsequent amendments.

Certain provisions of the Communications Act, the Facilities Act of 1962, and the Public Broadcasting Act of 1967 as amended, apply specifically to public broadcasting. These provisions affect public broadcasting licensees' operations by restricting the use of federally funded facilities for revenue-generating purposes, bans on advertising, and bans on endorsement or support of candidates for political office.

Public broadcasting licensees are scrutinized rigorously as recipients of direct and indirect governmental aid. Many licensees exist on the basis of various state and local statutes containing a variety of operational responsibilities and regulations. In addition, public broadcasters often operate charitable foundations, endowments or corporations for fund-raising, program production, etc. which are subject to state and federal regulation as tax exempt entities.

Public broadcasting licensees also have the responsibility of operating within the areas of free press and free speech protected by the First Amendment. As such they are held to the same public scrutiny and expectations as the largest and most prestigious journals and networks in the country.

However burdensome or intimidating the complex labyrinth of statutory and regulatory responsibilities of public broadcasting licensees may be, they are far outweighed by the unlimited opportunities for service to the public. Trustees and station managers must master the intricacies of their legal circumstances and be prepared to seek remedy or exemption to any local or state regulation(s) which impair their ability to assure fidelity to the public trust which their broadcasting license represents. In no arena is the responsibility of the trustee to educate public policymakers more important.

V. We Have a Fiduciary Responsibility for Public Funds.

Public broadcasting operations use millions of dollars of individual and corporate contributions; and federal, state, and local taxes. Neither good structural design nor strict operational procedures will preserve the overall credibility of the system unless the public and its representatives perceive that they are getting good value for their money.

Trustee are responsible for assuring continued public support for and funding of the public broadcasting station, and should have total control over all funds and resources regardless of source, whether appropriated, earned or given. Yet state laws, regulations and operating practices often prevent this. While such management controls are necessary for usual state government operations, they can seriously hamper public broadcasting's ability to function efficiently and economically because its process and its product are so different from most state services and because it operates within deadline pressures unknown in most areas of government. It is often impossible to provide the high quality broadcasting service the public expects with many of the restrictions imposed by state operating systems.

While trustees of institutional licensees may not have ultimate control over the allocation of funds, they are nevertheless responsible for insuring that such funds are used effectively and efficiently. They must certify to the public and to all funders that they have spent public broadcasting funds wisely and well.

It is therefore necessary that trustees and station managers seek exemption from procedures and policies which may prevent the cost-effective and efficient operation of their licensee. Sound financial management of a public broadcasting station is crucial to it credibility.

Why the Principles of Editorial Integrity in Public Broadcasting Were Developed

". . . the goal we seek is an instrument for the free communication of ideas in a free society."[1/]

"An effective national educational television system must consist in its very essence of vigorous and independent local stations."[2/]

". . . as state instrumentalities, these public licensees are without the protection of the First Amendment."[3/]

The Wingspread Conference on Editorial Integrity in Public Broadcasting was convened so that public broadcasting station managers and representatives of state licensee boards and commissions could explore the First Amendment position of public broadcasting licensees in the light of past legal decisions and legislative actions. The managers and trustees also drafted policies and practices which would help to guarantee public broadcasting's editorial integrity in the future.

Editorial integrity is rooted in the traditional American values of freedom of speech and of the press. Tenaciously and courageously fought for by Revolutionary editors and

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1/ James R. Killian, Jr. *et al. Public Television, A Program for Action. The Report of the Carnegie Commission on Educational Television.* New York: 1967.

2/ *Ibid.*

3/ *Muir v. Alabama Educational Television Commission,* 688 F.2d at 1041.

pamphleteers, these values are codified in the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press.. ." The First Amendment is the "indispensable bulwark of democracy."[4/]

Broadcasting, the twentieth century electronic press, is the most powerful medium we have for disseminating information. Its power lies in its pervasiveness and in its ability to appeal directly through sight and sound to the intellect, and especially to the emotions, of its audience. This enormous power is in the hands of the Federal Communications Commission which has the final authority to grant or deny access to the technical means of broadcasting.

The social worth of any broadcasting system is determined by the honesty and integrity of the powerful few who can grant or deny this access. The writers, producers, and editors who create the programs, which are broadcasting's core, are subject to the governing structure of the institution which controls the technical means of broadcasting.

In the United States, the most influential gatekeepers are private financial interests licensed by the Federal Communications Commission. The history of broadcasting in this country is largely the story of the growth of a major commercial enterprise.

4/ Harry S. Ashmore. *Fear in the Air – Broadcasting and the First Amendment: the Anatomy of a Constitutional Crisis*. New York: 1973.

Several alternatives were available in the 1920s when it became apparent that some policies were necessary to deal with the burgeoning broadcasting structure. One was never considered – an unregulated market activity like publishing. The European model of a government monopoly was not seriously considered because of the American traditions of free enterprise and the weakness of socialist ideology in this country. Regulation as a common carrier was rejected because of the spectre of an American monopoly like AT&T.

When Congress passed the Radio Act of 1927, it rejected the government monopoly model for broadcasting adopted by many other Western nations. Instead, broadcasting became a regulated commercial activity, with private interests licensed by a federal agency as public trustees of specified frequencies, and charged to operate them in the "public interest, convenience, and necessity."

The system that emerged in 1927, and that remains today, is an uneasy compromise between government control and freedom of the press: broadcasters are selected by government and licenses; the licensing authority is ordered not to censor. It is a compromise that is possible only in a pluralistic society with a balance among a free print press, strong traditions of private enterprise, and individual freedom. But in choosing a system of licensed, limited channels, supported by advertising, the United States restricted its broadcasting largely to programming designed to attract the greatest number of viewers or listeners.

By 1934 the limited ability of the commercial broadcasting structure to provide educational, cultural and informational programming was becoming apparent. An amendment was proposed to the Communications Act of that year, reserving 25 percent of all radio frequencies for

educational, non-profit use. The amendment was defeated, but in 1945 the Federal Communications Commission set aside 20 of 100 FM channels for noncommercial radio, and in 1952 reserved 242 television channels for the noncommercial sector.

Educational institutions and state and local governments voluntarily sought these first noncommercial broadcasting licenses to enhance their ability to educate their constituencies, a legitimate activity for them. But it was an irony that in a nation where government broadcasting had not only been rejected but was anathema, government was now holding broadcast licenses. And it was to be a source of problems.

Several structures were selected to administer these noncommercial licenses, including state departments of education, local schoolboards, state university boards, and state agencies created specifically for broadcasting. In the latter case, state statutes were passed to establish and to provide a legal framework for the activities of the licensee.

As television's audiences increased, nonprofit community groups began to acquire noncommercial licenses, and began to broadcast more general interest programs.

By 1967, when Congress discussed how government could support alternative uses of broadcasting without violating the First Amendment, it was discussing a system already in place: 126 educational television stations and 268 noncommercial FM radio stations were operating, most licensed to educational institutions and state and local governments. Educational broadcasting was poised to become a national institution.

The 1967 congressional debate was guided by the report of the Carnegie Commission on Educational Television,[5/] established to "conduct a broadly conceived study of noncommercial television" and to *"focus its attention principally, although not exclusively, on community-owned channels and their services to the general public."*

The Carnegie Commission admitted that its attitude toward instructional television, the purpose of most of the existing stations, was ambivalent. It concluded that "with minor exceptions, the total disappearance of instructional television would leave the educational system fundamentally unchanged."

The Commission proposed a new kind of television – public television which was to include "all that is of human interest and importance which is not at the moment appropriate or available for support by advertising, and which is not arranged for formal instruction." And it proposed a new system

> "not patterned after the commercial system or the British system or the Japanese system or any other existing system. We have attempted to design something that corresponds to American traditions and American goals, that can coexist amicably with commercial television, and that together with commercial television can meet the highest needs of our society."

5/ Killian et al, *op. cit.*

To produce and distribute this new television, the Commission recommended a connected system of local stations and national production centers, funded by private and government funds distributed by a "federally chartered, nonprofit, nongovernmental corporation." The question was how to expand and improve the services of educational broadcasting, while the major concern was how to increase funding, especially the government funding deemed necessary, without opening the door to funder control.

Guided by the Commission report and prompted by President Lydon B. Johnson, Congress passed the Public Broadcasting Act of 1967. While Congress did not accept all the Commission's recommendations, it did follow the basic intent of the report by creating the Corporation for Public Broadcasting, a private, nonprofit organization to receive and spend private and federal funds for public broadcasting, and to provide an impartial, responsible buffer from political pressure.

As it had in 1927, Congress made an uneasy compromise. It failed to provide the stable funding that would insure effective planning and insulation from political interference. And the ability of the Corporation to carry out its mandate would depend on the ability of presidential board appointees to function nonpolitically. With some minor changes, it is a theoretical answer to a fundamental question that has worked well, and that has survived several serious challenges.

The major problems in the Commission's report and the resulting legislation was its failure to deal with the diversity of licensee structures in the educational broadcasting system. The expansion of services and programs to broader audiences cast stations in a role they

were ill-equipped to play well. Funding sources outside state government required accounting procedures of state licensees which they had no way to implement. State and local government and institutional licensees had the most difficulties.

These problems were noted in a 1980 study,[6/] which focuses on financial problems including budgeting, purchasing and reporting procedures. Personnel management, including classification and compensation, were difficult areas for many licensees. Many licensees, especially institutional ones, were concerned about governance and reporting structures.

To deal with some of these problems, many states have amended the statutes that enable them to hold broadcast licenses and to operate stations. Kentucky has given its broadcasting authority full jurisdiction over its personnel. Oklahoma has made it a misdemeanor punishable by a $1,000 fine or one year imprisonment for any elected official or his or her representative to influence or direct, or attempt to influence or direct, the content of any program shown on public television. A number of states have established nongovernmental foundations to receive and disburse funds.

Concluding its section on insulation from political interference, the 1980 study by Schenkkan said,

> "The First Amendment is, of course, one firm standard or criterion of protection, in spite of the variability of interpretations given it by

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6/ Robert F. Schenkkan, Carol M. Thurston, Alan Sheldon. *Case Studies in Institutional Licensee Management.* Washington, 1980.

> the Supreme Court. Since public broadcasting is clearly not subject to the debate about being 'common carriers' of information, its claim and right to protections afforded by the First Amendment should be essentially unequivocal."

But public broadcasters, especially state government licensees, discovered through the court cases on the "Death of a Princess" broadcast, that these unequivocal protections were quite uncertain, and public broadcasting's freedom of editorial discretion might not enjoy the protection of American ideals of free speech and free press. Legal analysis by Nicholas P. Miller, Esq., shows public broadcasting's First Amendment rights to be "unclear," analysis "a tangled web," and the law to be "murky."[7/] Further analysis demonstrates that because of the diversity of licensee types and their governing structures, and the diversity of funding sources, including the government, the independent exercise of editorial discretion by public broadcasting professionals is extremely vulnerable to external pressures from individuals and entities who perceive a vested interest.

Governing boards and/or commissions of pubic broadcasting organizations may be either liable as part of the problem, or capable of being a major part of the solution by insulating the broadcasting professional from any undue external pressures. Board members and commissioners must be aware of the importance of their functional independence

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7/ *Proceedings of the Wingspread Conference on Editorial Integrity in Public Broadcasting*. Southern Educational Communications Association, Columbia, S.C., 1985.

and of the dangers to a democratic society of interference with public broadcasting's editorial discretion.

The Schekkan study suggests a way for trustees to provide program service the public perceives as credible:

> "It is tempting to seek some kind of general document which so defines the role of the station that licensees or others in official position will be discouraged from tampering with the station's activities. . . No state or institution can be compelled to hold such a license and to pay for activities that they do not wish to be associated with; however, once the licensee responsibilities begin, there are public requirements and obligations that must not be subjected to personal pique and whimsy. One device that has been suggested as a means of addressing this matter with some respect and definition would be for the trustees of a licensee to sign a document which would indicate their understanding of the organization's status as a federal license-holder and would elaborate the protocols of station operations."

Participants in the Wingspread Conference on Editorial Integrity in Public Broadcasting arrived at a similar conclusion after considerable debate. At their direction, the principles and the accompanying guidelines in this document were developed. The ultimate goal of these principles and guidelines is to assist trustees of public broadcasting licensee stations to fulfill their vital role in protecting the editorial integrity of public broadcasting in America.

APPENDIX J

THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION

THE ARKANSAS EDUCATIONAL TELEVISION NETWORK

PROGRAMMING POLICY STATEMENT FOR AETN

1. PROGRAMMING DECISION-MAKING

The programming authority for the broadcast service provided by AETN is assigned by the Federal Communications Commission to the Arkansas Educational Television Commission and allocated by them to the Executive Director who as "Editor" may delegate the exercise of this authority to professional staff based on informed programming discretion founded upon the Commission's mission statement, determinations of Arkansas needs, problems, and interests, seasoned judgment, media research, mail/phone comments from viewers and the public, and consultation with television programming experts.

2. CONFORMITY TO FCC RULES AND REGULATIONS, PBS GUIDELINES, AND STANDARD PRACTICES OF THE INDUSTRY

AETN follows all requirements of the Federal Communications Commission which grants the license to operate broadcast facilities. Although industry guidelines and standard practices do not have the force of law, AETN follows a course consistent with contemporary mainstream trends in the public broadcasting field.

3. INSTRUCTIONAL PROGRAMS

AETN believes that the use of television for instructional purposes can contribute significantly to the improvement of education at K-12, higher education, vo-tech education, and adult education levels.

In selecting programs for possible use in support of instruction, AETN screens and evaluates the programs with input from teachers, school administrators, and representatives from state educational agencies: Department of Education, Department of Vo-Tech Education, Section of Adult Education, and Department of Higher Education.

4. GENERAL AUDIENCE PROGRAMS

AETN believe that there is great value . . . in the broadcast sense of the word "educational" . . . in the programs intended for viewing at home by the general public. As a state agency, AETN fulfills a unique role for all Arkansas by providing information, building a better quality of life, and facilitating personal growth and awareness. This kind of television is a life-long learning experience.

5. PROGRAM QUALITY

AETN seeks to obtain the highest quality programs available so that each program or series is regarded as "the best of its kind". There are many aspects of program quality, including but not limited to:

excellence	creativity
artistry	innovation
thoroughness	boldness
credibility	accuracy
fairness	balance
virtuosity	high technical standards
stimulating	enlightening
informative	interesting
challenging	educational, in the broadest sense.

6. EDITORIAL INTEGRITY

AETN is subject to a variety of legal requirements as a holder of the broadcast license from the FCC and as an entity operating under the provisions of the Commissions Act of 1934, the Public Broadcasting Act of 1967, and other statutes.

AETN operates in the constitutionally protected area of public speech, and as a trustee of a public service it maintains a high level of commitment to responsiveness to the issues of the day . . . however controversial the content . . .through journalistically sound TV programs.

To maintain a credible programming effort, AETN acquires or produces and presents and promotes TV programs that meet the needs and satisfies the interest of viewers.

AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources.

AETN bases its public service programming on its value in the marketplace of ideas; not in financial considerations or commercial pressures.

To guide its efforts toward maintaining editorial integrity, AETN applies the principle contained in "Editorial Integrity in Public Broadcasting: Proceedings of the Wingspread Conference (1984)".

7. NON-COMMERCIALISM

AETN fully complies with rules and regulations of the FCC which prohibit educational television stations from selling broadcast time for advertising products or services. Underwriting the cost of program production and presentation is allowed and encouraged following FCC rules and guidelines adopted by the public broadcasting community.

8. NON-SECTARIANISM

AETN will not broadcast any program that proposes acceptance or rejection of any religious dogma or belief. As a state agency, AETN observes the constitutional principle of separation of church and state, and it applies this principle in day-to-day programming decision-making.

9. APOLITICASISM

AETN does not permit its facilities or broadcast time to be used for partisan political purposes by any political organization, office-holder, or candidate for office.

10. DIVERSITY

AETN furthers the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time. In matters of public importance that may be controversial, special attention is invested to assure fairness in treatment of different points of view.

11. ON-AIR FUNDRAISING

AETN seeks funds from its viewers and other who voluntary want to help support its program service. To avoid diffusing these efforts, AETN does not broadcast announcements or programs that intend to raise funds for other organizations.

12. WOMEN AND MINORITIES

AETN provides a bulwark against program domination by any single point of view, and it makes continuing efforts to reflect the pluralism of our society through appropriate representation of women and minorities.

13. PROGRAMS FOR CHILDREN

AETN provides outstanding programs with educational value for pre-school and school-age children for home viewing. Supportive of the formal in-school curriculum, these programs are selected by AETN for their educational value, information content, and appropriate treatment of topics . . . free of stereotypes, gratuitous violence, or commercial exploitation.

14. LOCALLY-PRODUCED PROGRAMS

Although AETN often presents outstanding programs produced elsewhere, the capability for AETN to produce programs by, for, and about Arkansas is a unique opportunity for public service and educational enhancements. Locally-produced programs relevant and responsive to Arkansas needs, problems, issues, and concerns are a very important part of a comprehensive broadcast schedule tailored to the interests of the people of this state.

15. INDEPENDENT PROGRAMS

AETN recognizes that quality programs may be obtained from independent producers outside the public television community. AETN reviews program concepts and screens completed programs that are offered by independent producers and may broadcast such programs that meet otherwise unmet needs.

16. PROGRAM BREAKS

AETN uses the available time between TV programs for non-commercial purposes; following these priorities:

1) Emergency announcements for the public safety

2) Station identification and other notices required by the FCC

3) Underwriting announcements required by the FCC

4) Promotional announcements for upcoming AETN programs

5) Program material to maintain continuity of audience flow

6) Public Service Announcements, according to guidelines.

APPENDIX K

LETTER FROM SUSAN HOWARTH TO RALPH P. FORBES

September 4, 1992

Ralph P. Forbes
Box 88
London, AR 72847

Dear Mr. Forbes:

This is written in response to your letter of August 24 regarding the congressional debate produced, jointly, by AETN and the Associated Press.

Under *47 USC 315*, as interpreted by the Federal Communications Commission and the Courts, debates are exempt from the equal opportunity requirement.

AETN has made a bona fide journalistic judgement that our viewers would best be served by limiting the debate to elected nominees of the two major parties.

Your letter indicates an interest in an administrative appeal of an adverse decision. You should feel free to contact the Fairness/Political Programming Branch of the Enforcement Division, Federal Communications Commission, Area Code 202-632-7586.

Sincerely,

/s/ Susan Howarth

SUSAN HOWARTH
Executive Director

PS: Mail intended for AETN management should be addressed to P.O. Box 1250, Conway, AR 72032. P.O. Box 100 is a bank dropbox and mail so addressed reaches us one to three days after arrival in the Conway Post Office.

APPENDIX L

LETTER FROM RALPH P. FORBES TO SUSAN HOWARTH

FORBES FOR US
* BOX 88 *
* LONDON, AR 72847 *

501-293-4641

August 24, 1992

Ms. Susan Howarth
AETN, President
Box 100
Conway, AR 72032

Dear Ms. Howarth,

Thank you for fulfilling your civic duty by scheduling a debate between the candidates for the office of House of Representatives from the 3rd District of Arkansas.

This is to notify you that I am the certified Independent Candidate for this office, and I am respectfully requesting that I be included on equal terms with my two opponents in this debate.

Because I am a candidate for change, in the past I have experienced some shameful violations of my rights, including party bosses refusing to certify my nomination after I won a statewide primary election by 63% fair and square; being forced into a run-off after I won 53% of the total vote in a 3-way statewide primary in which I carried 72 of Arkansas' 75 counties. The run-off was an illegal election because more than 75% of the voting places required by law to be open were closed in the 72 counties which I carried in the primary. These are only a few of the blatant examples of discrimination, dirty politics and suppression of the democratic process in thousands of pages of court cases in state and federal courts in Arkansas.

It is my experience that the politicians, their fat cat wire pullers, and the special interests that control this state will stop at nothing, no mater how low down, filthy, disgusting and illegal, including censorship, denial of the right to vote via *affirmative action* "elections," conspiring to deny rights under color of law, *ad nauseam*, to prevent the People from replacing these crooks and their tyrannical ilk.

Ms. Hovarth, I am certain that you and AETN want to do the right and fair thing by inviting me and affording me equal opportunity, but I am also sure you will be subjected to tremendous pressures from special interests, scared politicians and the terror squads of "politically correct" bigots to censor me and my ideas. This is especially undesirable as the eyes of the nation and the world will be focused on Arkansas during this presidential election with Governor Clinton being the supreme executive over the publicly owned, Arkansas Education Television Network.

Let me share some of thoughts and words of one of my philosophical mentors that are a strong defense against those who would try to deny the people of Arkansas, especially the 3rd District, from hearing me and my ideas to help them:

"If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."

Thomas Jefferson, letter to Col. Charles Yancey, Jan. 6, 1816

"Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day.

Thomas Jefferson, Letter to Du Pont de Nemours, April 24, 1816

"I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."

Thomas Jefferson, Letter to William Charles Jarvis, Sept. 28, 1820

"Men by their constitutions are naturally divided into two parties:

(1) Those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes. (2) Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist: and in every one where they are

free to think, speak and write, they will declare themselves."

Thomas Jefferson, Letter to Henry Lee, Aug. 10, 1824

"For here we are not afraid to follow the truth wherever it might lead, nor to tolerate any error so long as reason is left to combat it."

Thomas Jefferson

"The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspaper, or newspapers without government, I should not hesitate a moment to prefer the latter."

Thomas Jefferson, Letter to Col. Edward Carrington, Jan. 16, 1787

"God who gave us life gave us liberty. Can the liberty of a nation be secure when we have removed a conviction that these liberties are a gift of God?

Indeed I tremble for my country when I reflect that God is just, that his justice cannot sleep forever."

Thomas Jefferson, *Notes on the State of Virginia,* Query 6 (1781-1785)

"I have sworn upon the alter of God, eternal hostility against every form of tyranny over the mind of man."

Thomas Jefferson, Letter to Dr. Benjamin Rush, Sept. 23, 1800

The wording of 47 USC 315 is so plain and simple that every ordinary American with the commonsense God

gave him or her knows what it says and that it means I have a right to appear and they have right to hear me so they can make an intelligent, informed choice when they vote.

"I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

James Madison, Speech in the Virginia Convention, June 16, 1788

Unfortunately, in 1983 some lawyers and bureaucrats arbitrarily, misinterpreted the exemption provision, so that ala *1984's "Ministry of Truth"* the law has been turned inside out to nullify its purpose by doing *exactly the opposite of what it says*:

"Affording equal access to all candidates," according to this worm-tongued, truth-twisting theory, "means that those in power may exclude and discriminate against candidates of genuine change."

But double-minded Orwellian double-speak and double-think is, alas, all too common in the Alice in Wonderland created by the politicians and special interest lawyers who run this country as if they were the Mad Hatter, the March Hare and the Queen of Hearts.

To deny anyone equal access is discriminatory and wrong, isn't this true?

To suppress any ideas or censor anyone's expression of opinion is a violation of Free Speech, which I am sure you would not allow to happen.

Ms. Howarth, I would appreciate receiving your reply to my request for equal opportunity and free speech as soon as possible.

Because if the dirty politics I have fought in the past is still doing "bidnis" as usual and if they have the power to pressure AETN to deny me and the people of Arkansas our rights, *then I must have sufficient time to exhaust my "administrative remedies," so I can get any appropriate order from a federal court in time so the people can hear me before the election is over.*

Yours for A Free and Equal Opportunity America,

/s/ Ralph P. Forbes

CC: